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Supreme Court of the United States

ARMANDO JIMÉNEZ VIRACACHA, IRMA YOLANDA JIMÉNEZ, ELIANA MARITZA JIMÉNEZ, ANDRES FELIPE JIMÉNEZ, MARIA PAULA JIMÉNEZ,

Petitioners,

—v.—

MICHAEL B. MUKASEY,
UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Attorney General may consider untimely asylum applications if the applicant demonstrates to his satisfaction either "the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application . . . ." *See* 8 U.S.C. 1158(a)(2)(D). The courts of appeals uniformly agree that review of the Attorney General's timeliness determinations is limited to "constitutional claims" and "questions of law" pursuant to 8 U.S.C. 1252(a)(2)(D). But they are deeply divided over the meaning of the term "questions of law" – a disagreement that not only determines whether hundreds of asylum appeals will be dismissed on jurisdictional grounds each year, but the federal courts' jurisdiction over numerous other immigration issues where jurisdiction is governed by Section 1252(a)(2)(D). The questions presented are:

1. Whether the Seventh Circuit erred in dismissing petitioner's claims regarding the statutory exceptions for late-filed asylum applications on the ground that 8 U.S.C. 1252(a)(2)(D) does not cover claims involving the "application of law to fact."

2. Whether the Constitution guarantees review in some court by some means over petitioner's claims regarding the asylum filing exceptions.

PARTIES TO THE PROCEEDING

Petitioners are Armando Jiménez Viracacha; Irma Yolanda Jiménez; Eliana Maritza Jiménez; Andres Felipe Jiménez; and Maria Paula Jiménez. Petitioners were also petitioners in the court of appeals, but were respondents before the Immigration Court and Board of Immigration Appeals.

Respondent, who was also the respondent in the court of appeals, is Michael B. Mukasey, Attorney General of the United States.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Armando Jiménez Viracacha, Irma Yolanda Jiménez, Eliana Maritza Jiménez, Andres Felipe Jiménez, and Maria Paula Jiménez respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a)[1] is reported at 518 F.3d 511. There were no district court proceedings. The decision and order of the immigration judge (App. 11a), and the decision of the Board of Immigration Appeals (App. 28a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2008. The jurisdiction of this Court is invoked under

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 33a) are pertinent portions of the Suspension of Habeas Corpus Clause of the Constitution, Art. I, § 9, Cl. 2; and 8 U.S.C. 1158(a)(2), 1158(a)(3), 1158(a)(2)(D), 1252(a)(2)(D).

STATEMENT

A. Statutory Background.

1. Congress enacted the Refugee Act of 1980 to bring this country into compliance with its obligations under the United Nations Convention

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[1] "App." refers to the appendix attached to this petition.

Relating to the Status of Refugees. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987). To qualify for asylum, applicants must show that they cannot return to their home countries because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *Id.* at 423; 8 U.S.C. 1158(b)(1)(A); 8 U.S.C. 1101(a)(42)(A). Where the applicant meets these statutory prerequisites, the Attorney General has discretion to grant asylum. *Cardoza-Fonseca*, 480 U.S. at 423.

In 1996, Congress enacted an asylum filing deadline. Under the new restriction, applicants may not apply for asylum unless they can demonstrate by clear and convincing evidence that they filed their application within one year after their arrival in the United States. 8 U.S.C. 1158(a)(2)(b).

In response to significant controversy over the proposed deadline, Congress also simultaneously enacted two statutory exceptions in the 1996 legislation. Under these exceptions, untimely asylum applications may be considered where the alien can demonstrate to "the satisfaction of the Attorney General the existence of either changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the [one-year] period specified." 8 U.S.C. 1158(a)(2)(D). *See also* 142 Cong. Rec. S11838, S11840 (Sept. 30, 1996) (statement of Sen. Hatch) (explaining the "changed" and "extraordinary" exceptions were added out of the "concern" that asylum remain "available for those with legitimate claims").

Congress recognized that there would often be legitimate reasons for an alien's failure to apply for asylum within one year of arrival in the United States and that these exceptions were thus critically important given the life and death stakes at issue. *See* 142 Cong. Rec. S11491 (Sept. 27, 1996) (statement of Sen. Hatch) (emphasizing that "the two exceptions" are intended to "provide adequate protections to those with legitimate claims of asylum"). Among the various examples cited by Congress were aliens who legitimately failed to apply within one year but subsequently obtained "more information about likely retribution [they] might face if [they] returned home," 142 Cong. Rec. S11838, S11840 (Sept. 30, 1996) (statement of Sen. Hatch), or who learned their "home government may have stepped up its persecution of people of [their] religious faith or political beliefs," 142 Cong. Rec. S11491 (Sept. 27, 1996) (statement of Sen. Hatch), or were delayed because there was a "temporary unavailability of professional assistance." 142 Cong. Rec. S4730, S4748-49 (May 6, 1996).

Congress made clear that these exceptions were to be given a liberal interpretation to ensure that no alien with a genuine claim for asylum would be turned away for failing to apply within the one-year deadline. 142 Cong. Rec. S11838, S11839-40 (statement of Sen. Hatch) (stating that the "important exceptions" are meant to "ensur[e] that those with legitimate claims of asylum are not returned to persecution, particularly for technical deficiencies"). *See also id.* (statement of Sen. Abraham) (explaining that the changed circumstances provision covers "a broad range of circumstances," and emphasizing the need for close

congressional "attention to how the provision is interpreted" to ensure that the exceptions "provide sufficient protection to aliens with bona fide claims of asylum").

2. Under the general judicial review procedures of the INA, 8 U.S.C. 1252 *et seq.*, asylum applicants may file a "petition for review" in the court of appeals. Judicial review of the one-year deadline or statutory exceptions for late-filed applications is barred under Section 1158(a)(3), except insofar as the applicant is raising "constitutional claims" or "questions of law" pursuant to Section 1252(a)(2)(D). That limitation on review arises from the interaction of two sets of jurisdictional amendments to the INA (in 1996 and 2005), and this Court's intervening decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), which interpreted the 1996 amendments and triggered the passage of the 2005 amendments.

a. In 1996, as part of the comprehensive Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Congress passed a series of jurisdictional provisions that now permeate the INA. These provisions include limitations on review for aliens with certain types of criminal convictions (8 U.S.C. 1252(a)(2)(C)), for aliens raising certain types of discretionary claims (8 U.S.C. 1252(a)(2)(B)), and numerous other restrictions.

Of particular relevance here, as part of these 1996 amendments Congress also enacted a specific provision governing asylum filings, which bars "review" where asylum applicants challenge the determination that they failed to file within the one-year deadline or failed to satisfy one of the statutory

exceptions for late-filed applications. 8 U.S.C. 1158(a)(3).

In 2001, in *St. Cyr*, this Court addressed the 1996 jurisdictional amendments, and specifically the provision barring review for aliens removable on the basis of certain crimes (8 U.S.C. 1252(a)(2)(C)). The Court reached four principal conclusions relevant here.

First, the Court concluded that the 1996 jurisdictional restrictions generally barred direct review in the court of appeals by petition for review of claims regarding eligibility for discretionary relief. *St. Cyr*, 533 U.S. at 311-12; *see also Calcano-Martinez v. INS*, 533 U.S. 348 (2001) (companion case to *St. Cyr*). *Second*, the Court concluded that the preclusion of all review by any means over petitioners' claim would trigger "substantial constitutional questions" under the Suspension Clause. *Id.* at 300. *Third*, the Court held that the 1996 provision did not bar the alien's right to district court habeas corpus review under 28 U.S.C. 2241, relying heavily on the cannon of constitutional avoidance and the longstanding rule that habeas review may only be repealed by an explicit directive in the statute's text. *Id.* at 299, 312-13. *Finally*, the Court made clear that the Suspension Clause protected the substance of review, and not the form of review. Congress was thus permitted to provide a substitute for habeas corpus under 28 U.S.C. 2241 *provided* that it is "neither inadequate nor ineffective." *Id.* at 314, n.38. In particular, the Court stated that Congress could place review back into the court of appeals by petition for review as long as the petition for review procedure afforded a

level of review commensurate with that afforded in habeas. *See id; see also id.* at 305.

b. In 2005, Congress took up the Court's invitation in *St. Cyr* and enacted the REAL ID Act. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 106(a)(1)(A)(iii), 119 Stat. 310. As noted in the Joint House-Senate Conference Report, the REAL ID Act had twin goals. The first was to eliminate habeas review over challenges to removal orders and channel such review back to the courts of appeals by petition for review. Doing so, in Congress' view, would eliminate the delays inherent in providing a double layer of review (habeas review followed by an appeal to the circuits). Congress also believed that placing all review of removal orders back into the courts of appeals would eliminate the perceived anomaly created by the 1996 amendments, in which certain aliens sought review directly in the courts of appeals, while other aliens – those subject to a jurisdictional bar in the courts of appeals – obtained review by commencing actions in district court. Accordingly, Congress enacted several provisions that expressly eliminated habeas review over removal orders. *See, e.g.*, 8 U.S.C. 1252(a)(5); 1252(b)(9).[2]

The second goal of the Real ID Act was to ensure that the *scope* of review of removal orders

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[2] Although the REAL ID Act generally repealed habeas review over challenges to final removal orders, it made clear that it did not eliminate habeas review over all immigration decisions, such as detention challenges. *See, e.g., Hernandez v. Gonzales*, 424 F.3d 42, 42 (1st Cir. 2005). *See also* H.R. Rep. No. 109-72, at 175 (2005) (Conf. Rep.) (noting that the Act "would not preclude habeas review over challenges to detention that are independent of challenges to removal orders").

provided in the courts of appeals reached those claims traditionally reviewable in habeas, thus ensuring an adequate substitute for habeas. Indeed, the Conference Report expressly cites the Court's *St. Cyr* decision and acknowledges on several occasions Congress' understanding that it cannot eliminate habeas review without providing a commensurate substitute. H.R. Rep. No. 109-72, 175 (2005) (Conf. Rep.).

To accomplish this second goal, Congress chose not to try and amend each of the individual 1996 jurisdiction-stripping provisions. Rather, Congress enacted a generally-applicable jurisdictional trump card – 8 U.S.C. 1252(a)(2)(D). As previously noted, Section 1252(a)(2)(D) provides the courts of appeals with jurisdiction over "constitutional claims" and "questions of law" and does so *notwithstanding* the existing jurisdictional bars in the INA (with exceptions not relevant here).

Thus, in light of Section 1252(a)(2)(D), there is now no dispute that the courts of appeals may review claims by petition for review that previously would have been barred under the 1996 jurisdiction-stripping provisions – including claims that an asylum applicant satisfied one of the statutory exceptions for late-filed applications. Rather, the dispute concerns the *scope* of review, and in particular, the types of claims that fall within the meaning of "questions of law" in Section 1252(a)(2)(D).

B. Petitioner's Administrative Proceedings.

1. The lead petitioner in this case, Armando Jiménez Viracacha, is a native of Colombia who came to the United States in 1998, on a six-month tourist

visa. His wife and three children, also natives of Colombia, arrived in this country two years later, in 2000.[3]

In 2002, petitioner affirmatively applied for asylum before an asylum officer. 8 U.S.C. 1158; 8 C.F.R. 1208.3, 1208.9. The application was denied based on untimeliness and petitioner was subsequently placed in removal proceedings, charged with being out of status. He conceded removability on the basis of his expired visa and applied for withholding of removal under 8 U.S.C. 1253(h) and also renewed his asylum application under 8 U.S.C. 1158.

Like asylum, withholding requires aliens to show that they will be persecuted on one of the specified grounds, but applicants must meet a higher burden of proof and establish that "it is more likely than not" that they will be subject to persecution. *See INS v. Aguirre-Aguirre*, 526 US 415, 419 (1999); 8 U.S.C. 1253(h). If the applicant meets this higher burden, the Attorney General *must* withhold deportation. *Cardoza-Fonseca*, 480 U.S. at 423; 8 U.S.C. 1253(h)(1). And, importantly, withholding has no filing deadline.

2. The immigration judge granted petitioner withholding of removal, finding that he would be persecuted on account of his political association. Specifically, the immigration judge noted that petitioner "was shot at by members of the FARC"

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[3] Although Mr. Jiménez's wife and children are parties to the proceedings in this Court, and were parties in the Court of Appeals, he was the lead petitioner. For simplicity, this petition refers to only one petitioner, Mr. Jiménez.

[Revolutionary Armed Forces of Colombia] and "received numerous threats from FARC members . . . because of his political activism." App. 22a. The IJ concluded that if petitioner "returned and continued to campaign against the FARC," his activism "would likely engender the same response of threats," and there existed a "realistic likelihood that he will be mistreated because of his political opinion." *Id.*

Given that petitioner satisfied the higher burden imposed on withholding applicants, he necessarily would have qualified for asylum had he been permitted to apply. The immigration judge, however, concluded that he was statutorily ineligible for asylum, finding that he had not filed his application within one year of his arrival in the United States and that he had not demonstrated sufficiently "changed" or "extraordinary" circumstances to justify the late filing. App. 20a.

Petitioner's principal contention was that he satisfied the changed circumstances exception because conditions had dramatically and materially changed in Colombia given the breakdown of the peace process between the FARC and the Colombian government. The immigration judge did not dispute that there had been "many significant developments in Colombia" between petitioner's arrival in the United States and 2002, when he filed his application. App. 19a. The immigration judge concluded, however, that the relevant question under the statute was whether those developments "changed the circumstances in such a way as to cause a new situation to exist, one that hadn't existed during the period in which respondent was obligated to file . . . ." *Id.* As to that question, the immigration judge found that although the civil war

in Colombia had "intensified" over the years, the "nature of the conflict" was "essentially" the same because it was still a conflict between the FARC and the Colombian government. App. 19a-20a. Consequently, the immigration judge concluded that petitioner did not satisfy the "changed" circumstances exception.

The immigration judge also rejected petitioner's claim that he satisfied the "extraordinary circumstances" exception. App. 18a-19a.[4]

3. The Board of Immigration appeals ("BIA" or "Board") affirmed the asylum ruling on the basis of the immigration judge's decision, finding that petitioner had not satisfied either of the statutory exceptions for missing the deadline. App. 29a ("we adopt and affirm the decision of the Immigration Judge"). The government did not appeal the grant of withholding.

C. The Seventh Circuit's Decision.

The court of appeals dismissed the petition for review for lack of jurisdiction. Accordingly, it did not reach the merits of whether petitioner had satisfied one of the statutory exceptions for late-filed asylum applications. App. 6a, 10a.[5]

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[4] As the court of appeals explained, asylum affords significant benefits that are not available to aliens who are granted withholding, including freedom of travel, legal permanent residence, and eventual citizenship. App. 5a. Thus, the grant of withholding did not afford petitioner and his family full relief.

[5] Before turning to the central jurisdictional question in the case, the court of appeals concluded that it was not deprived of jurisdiction simply because the Board had remanded the case to the IJ for a background check regarding the withholding grant.

The Seventh Circuit began by noting that 8 U.S.C. 1158(a)(3), enacted in 1996, prohibited review of the filing exceptions, but acknowledged that the REAL ID Act had now restored its jurisdiction over these determinations to review "constitutional claims" or "questions of law." App. 6a (citing 8 U.S.C. 1252(a)(2)(D)). The court nonetheless concluded that petitioner's claims were unreviewable under Section 1252(a)(2)(D).

The court of appeals recognized that petitioner was not seeking judicial review of historical, descriptive facts, such as when particular events occurred in Colombia. Rather, the court noted that petitioner was challenging the Board's determination that he failed to satisfy the statutory exceptions and was thus raising a claim involving the "application of law to fact." App. 6a. The court nonetheless concluded that it lacked jurisdiction, citing the Seventh Circuit's prior decision in *Cevilla v. Gonzales*, 446 F.3d 658 (7th Cir. 2006), *reh'g en banc denied*, which held in another context that Section 1252(a)(2)(D)'s reference to "questions of law" encompassed only "pure" legal issues.

Elaborating on *Cevilla*, the court of appeals stated that Section 1252(a)(2)(D)'s reference to "questions of law" encompassed only those "situations in which a case comes out one way if the Constitution or statute means one thing, and the other way if it means something different." App. 7a. Thus, because the court found that the Board had correctly "stated" the legal standards governing the statutory exceptions for late filings, it held that its

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App. 3a-5a; *see also* App. 3a (noting that background checks were successfully completed before the Seventh Circuit's decision on asylum).

jurisdiction was at an end and that it could not review whether the Board failed to correctly *apply* the legal standards to the facts of the case. App. 6a.

The court also concluded that the complete preclusion of review over petitioner's claims raised no constitutional concerns, relying on the fact that no court has ever questioned the constitutionality of Section 701(a)(2) of the Administrative Procedure Act, which bars review of decisions "committed to agency discretion by law." 5 U.S.C. 701(a)(2). The opinion did not mention this Court's *St. Cyr* decision, the Suspension Clause, or the significant body of immigration habeas law relied upon by the Court in *St. Cyr*.

The Seventh Circuit recognized that its holding was in direct conflict with the Ninth Circuit's position, *see* App. 7a-8a, but found the Ninth Circuit's reasoning unpersuasive. App. 9a (stating that the Ninth Circuit's decision "does not persuade us"). The court also stated that although the Second Circuit had taken a position similar to the Ninth Circuit's, that court had now retreated from its earlier view. App. 7a. As discussed below, however, the Seventh Circuit's characterization of the Second Circuit's position is incorrect, as was its statement that at least seven other circuits "read § 1252(a)(2)(D) as limited to pure questions of law." App. 9a.

REASONS FOR GRANTING THE WRIT

The jurisdictional issue presented by this case is of great practical importance for the adjudication of asylum claims and for the jurisdiction of the federal courts with regard to review of immigration decisions. Eleven circuits have addressed the issue

and are divided. That division is mature and entrenched, and will not benefit from further litigation in the circuits. Moreover, the jurisdictional provision at issue here – 8 U.S.C. 1252(a)(2)(D) – is one of general applicability and affects numerous immigration issues beyond asylum. Because the courts of appeals have taken widely divergent analytical approaches in assessing the scope of Section 1252(a)(2)(D), the number of issues affected, and the level of confusion, will likely only increase. Finally, the Seventh Circuit's decision is wrong and cannot be squared with Section 1252(a)(2)(D)'s text and legislative history or this Court's Suspension Clause analysis in *St. Cyr*.

I. THIS CASE INVOLVES AN ENTRENCHED CIRCUIT SPLIT ON A JURISDICTIONAL ISSUE OF BROAD SIGNIFICANCE.

A. The Courts Of Appeals Are Divided Over Their Jurisdiction To Review Determinations Regarding The Statutory Exceptions To The One-Year Asylum Filing Deadline.

Every circuit (other than the D.C. Circuit) has addressed the extent to which the courts of appeals have jurisdiction to review claims regarding the statutory exceptions to the one-year filing deadline. They are divided, both in result and analysis. The Ninth Circuit has held that it may review whether applicants have satisfied the statutory filing exceptions. The Second Circuit has taken a less categorical but similar position to the Ninth Circuit's. The other nine circuits to address the issue (including the Seventh Circuit) have disagreed about

the meaning of Section 1252(a)(2)(D) in significant respects and have restricted review of the one-year deadline to a narrow subset of legal claims based on divergent and conflicting grounds.

1. Ninth and Second Circuits. The Ninth Circuit, in *Ramadan v. Gonzales*, 479 F.3d 646 (per curiam), *reh'g en banc denied*, 504 F.3d 973 (9th Cir. 2007), has squarely held that the term "questions of law" in Section 1252(a)(2)(D) encompasses claims involving the "application of law to fact" and is not limited to pure questions of law. Accordingly, in the Ninth Circuit, asylum applicants may challenge whether, on the facts of their case, they satisfied the statutory exceptions for late-filed applications – *i.e.*, whether the "changed" or "extraordinary" circumstances exceptions were correctly *applied* to their case. 479 F.3d at 648.[6]

In reaching that conclusion, the Ninth Circuit emphasized that Section 1252(a)(2)(D) did not permit it to review pure historical, descriptive facts. But, as *Ramadan* explained, claims involving the application of law to fact do not require a reviewing court to disturb the historical facts found by the immigration judge or Board. *Ramadan*, 479 F.3d at 657. The Ninth Circuit also acknowledged that Section 1252(a)(2)(D) did not permit it to review pure discretionary claims, but rejected the government's

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[6] In *Ramadan* the Ninth Circuit originally dismissed the petitioner's claims for lack of jurisdiction on the ground that Section 1252(a)(2)(D) was limited to constitutional claims and questions of statutory construction. *See Ramadan v. Gonzales*, 427 F.3d 1218 (9th Cir. 2006). On rehearing, and after fuller briefing and argument, the court revised its decision, adopting its current position. *Ramadan v. Gonzales*, 479 F.3d 646 (per curiam) (revising prior decision), *reh'g en banc denied*, 504 F.3d 973 (9th Cir. 2007).

contention that the statutory standards governing late-filed asylum applications were discretionary. *Id.* at 654-56.

The Second Circuit has likewise squarely rejected the position that Section 1252(a)(2)(D) is limited to reviewing "pure" errors of law and has held that it may review claims involving the "application of law to fact." *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 324-30 (2d Cir. 2006).[7] The Second Circuit has also acknowledged that it may not review pure factual findings or discretionary claims. *Id.* But, unlike the Ninth Circuit, the Second Circuit in *Chen* did not attempt to define the precise line between reviewable and unreviewable claims, and instead held that a reviewing court should carefully examine the particular type of claim raised in each case to determine whether the asylum applicant was raising a question of law within the meaning of Section 1252(a)(2)(D). *Chen*, 471 F.3d at 330. In adopting that case-by-case approach, the Second Circuit left no doubt, however, that it was not confining review under Section 1252(a)(2)(D) solely to those instances where the Board *misstated* the governing legal standard.[8]

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[7] Like the Ninth Circuit, the Second Circuit in *Chen* initially concluded that Section 1252(a)(2)(D) was limited to pure claims of statutory construction, *Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144 (2d Cir. 2006), but on rehearing adopted its current position. *See Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 324-30 (2d Cir. 2006) (revising prior decision).

[8] The court of appeals in this case incorrectly stated that the Second Circuit recently retreated from *Chen* in *Liu v. I.N.S.*, 508 F.3d 716 (2d Cir. 2007). But *Liu* specifically applied the analytical framework in *Chen*. *Id.* at 720-21. More fundamentally, the applicant in *Liu* did not contend that the

2. The Seventh Circuit. In direct contrast to the Ninth and Second Circuits, the Seventh Circuit has taken the position that Section 1252(a)(2)(D) applies only to "pure" questions of law and, on that basis, dismissed petitioner's claims, which it characterized as involving only the "application of law to fact." App. 6a. In particular, the Seventh Circuit stressed that, in its view, the Board and immigration judge had both "stated with precision the rules for exceptions to the one-year deadline," and that petitioner was thus arguing only that he satisfied the filing exceptions on the facts of his case. *Id.* Accordingly, the court held that there was no "legal mistake" for it to review within the meaning of Section 1252(a)(2)(D) and that petitioner's jurisdictional position "boils down to the contention that every error an agency can make is in the end one of law." App. 6a (internal quotation marks omitted).

3. The Other Eight Circuits. The other eight circuits that have addressed whether the filing exceptions are reviewable have also substantially limited review, but have done so on the basis of a variety of analytical approaches. The cases fall into three basic categories.

The *first* category consists of those courts that have concluded that Section 1252(a)(2)(D) *does* authorize review of the application of law to fact, but have nonetheless held that their jurisdiction to review the filing exceptions is limited. Some of these circuits have reasoned that the filing exceptions are *discretionary*, and thus unreviewable for that reason.

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statutory exceptions had been improperly applied to him, but argued only that he filed within the one-year deadline, a pure *factual* claim. *Id.* at 721.

The other circuits in this category have not provided a specific reason for concluding that the filing exceptions are largely unreviewable.

The *second* category consists of those courts that have not taken a position generally on the scope of Section 1252(a)(2)(D). These circuits, however, have concluded that the application of the asylum filing exceptions raises predominately unreviewable *factual* issues.

The *third* category consists of the two circuits that have agreed with the Seventh Circuit that Section 1252(a)(2)(D) is limited to "pure" questions of law. These two circuits have also concluded that the application of the filing exceptions to particular cases raises unreviewable *discretionary* and/or *factual* claims.

(a) The first category consists of the Third, Fourth, Eighth and Eleventh Circuits. All four circuits have concluded that Section 1252(a)(2)(D) is *not* limited to pure questions of law. Like the Second and Ninth Circuits, these courts have specifically held that Section 1252(a)(2)(D) encompasses claims involving the application of law to fact. *See Toussaint v. Attorney General*, 455 F.3d 409, 412 n.3 (3d Cir. 2006) (concluding, that "we have jurisdiction to review the BIA's application of law to the facts of this case"); *Jean v. Gonzales*, 435 F.3d 475, 482 (4th Cir. 2006) (concluding that a "determination involving the application of law to factual findings ... presents a reviewable decision" under the REAL ID Act); *Nguyen v. Mukasey*, --- F.3d --- , 2008 WL 1700199, at *1 (8th Cir. Apr. 14, 2008) (per curiam) (concluding that "whether the IJ properly applied the law to the facts" is a reviewable "legal question");

Jean-Pierre v. Attorney General, 500 F.3d 1315, 1322 (11th Cir. 2007) (concluding that it could review "the application of an undisputed fact pattern to a legal standard").[9]

The Third and Eighth Circuits have nonetheless concluded that asylum applicants may generally not challenge whether they satisfied the filing deadline exceptions because those exceptions are "discretionary" in nature. *See Sukwanputra v. Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006) (concluding that the Attorney General's determination "entails an exercise of discretion" and is thus unreviewable); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005) (concluding that "the decision whether such [extraordinary] circumstances exist is a discretionary judgment"); *Jallow v. Gonzales*, 472 F.3d 569, 571 (8th Cir. 2007) (concluding that changed or extraordinary circumstances exception is "committed to the discretion of the Attorney General" and thus unreviewable).

The Fourth and Eleventh Circuits have also concluded that review of the filing exceptions is generally precluded, but, unlike the Third and Eighth Circuits, have not provided a specific basis for that conclusion. In particular, they have not stated whether they believe that the application of the filing exceptions to the facts of a given case is a predominately factual or discretionary issue. *See,*

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[9] *See also, e.g., Kamara v. Attorney General*, 420 F.3d 202, 211 (3d Cir. 2005) (holding that Section 1252(a)(2)(D) encompasses "issues of application of law to fact"); *Pinos-Gonzalez v. Mukasey*, 519 F.3d 436, 439 (8th Cir. 2008) (characterizing as a "legal question whether the IJ properly applied the law to the facts") (internal quotation marks and citation omitted).

e.g., *Niang v. Gonzales*, 492 F.3d 505, 510 n.5 (4th Cir. 2007) (finding, without explanation, no review of asylum filing exceptions); *Chacon-Botero v. Gonzales*, 427 F.3d 954, 956-57 (11th Cir. 2005) (concluding, without explanation, that the "timeliness of an asylum application is not a constitutional claim or question of law covered by the Real ID Act's changes"); *Romero v. Attorney General*, No. 07-11916, 2007 WL 4105363, at **2 (11th Cir. Nov. 20, 2007) (conclusorily rejecting contention that the Court may review claims where the applicant is not "questioning the BIA's findings of fact" but rather "challenging the legal conclusion that those facts do not constitute changed or extraordinary circumstances").

(b) The First and Fifth Circuits fall into the second category. Neither circuit has ruled specifically on the scope of Section 1252(a)(2)(D), and in particular, whether they believe the term "questions of law" encompasses the application of law to fact. *See, e.g.*, *Enwonwu v. Gonzales*, 438 F.3d 22, 33 (1st Cir. 2006) (noting that its precedent has left open the question whether the "application of legal principles to undisputed facts" constitutes a question of law).

These circuits have concluded, however, that the asylum filing exceptions are generally unreviewable, reasoning that claims involving the application of the filing exceptions to a particular applicant's case will generally raise only unreviewable *factual* claims. *Zhu v. Gonzales*, 493 F.3d 588, 596 & n.31 (5th Cir. 2007) (expressly disagreeing with the Ninth Circuit's conclusion in *Ramadan* that it may review "mixed" questions of law and fact, holding that it lacks "jurisdiction to

review timeliness determinations that are based on an assessment of the facts and circumstances of a particular case"); *Arif v. Mukasey*, 509 F.3d 677, 680 (5th Cir. 2007); *Mehilli v. Gonzales*, 433 F.3d 86, 93 (1st Cir. 2005) ("BIA findings as to timeliness and changed circumstances are usually factual determinations"); *Hana v. Gonzales*, 503 F.3d 39, 42-43 (1st Cir. 2007) (concluding that alien's claim that his depression and nervous breakdown amounted to "extraordinary circumstances" excusing his late filing did not constitute a question of law and was therefore unreviewable).

The First and Fifth Circuits thus appear to take the position that, for purposes of Section 1252(a)(2)(D), there is no significant difference between a case in which the applicant challenges a pure descriptive factual finding and a case where the applicant contends that, on the facts of his case, he satisfied one of the statutory exceptions to the filing deadline (as petitioner claims here). *Compare Ramadan*, 479 F.3d at 648 (defining the application of law to facts as those situations "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard") (*quoting Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)).

(c) Only the Sixth and Tenth Circuits have agreed with the Seventh Circuit that Section 1252(a)(2)(D) is limited to constitutional claims and "pure" questions of law. *See Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006) (limiting review under Section 1252(a)(2)(D) to "constitutional claims or matters of statutory construction"); *Shkulaku-Purballori v. Mukasey*, 514 F.3d 499 (6th Cir. 2007)

(same); *Diallo v. Gonzales*, 447 F.3d 1274, 1282 (10th Cir. 2006) ("in addition to constitutional claims, the REAL ID Act grants us jurisdiction to review a 'narrow category of issues regarding statutory construction'") (citation omitted); *Lorenzo v. Mukasey*, 508 F.3d 1278, 1282 (10th Cir. 2007) (same).[10]

The Sixth and Tenth Circuits have further held that the asylum filing exceptions are *discretionary* and thus unreviewable for that reason as well. *See Taghzout v. Gonzales*, Nos. 05-3667, 05-4335, 2007 WL 738634, at **5 (6th Cir. Mar. 12, 2007) (concluding that whether a petitioner's facts amounted to extraordinary circumstances is a "discretionary ruling"); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006) (argument that applicant's circumstances "qualified as either a

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[10] These circuits have cited the Conference Report's statement that the "purpose of [Section 1252(a)(2)(D)] . . . is to permit judicial review over those issues that were historically reviewable on habeas – constitutional and statutory-construction questions, not discretionary or factual questions." H.R. Rep. No. 109-72, 175 (2005). *See, e.g., Almuhtaseb*, 453 F.3d at 747-48 (discussing Conference Report); *Diallo*, 447 F.2d at 1282 (same). But that passage is not an exhaustive recitation of *all* legal claims that were reviewable in habeas. The Report is simply distinguishing legal claims from "factual" and "discretionary" claims. If the passage were read to be exhaustive, then the REAL ID Act would preclude review over *pure* questions of law regarding the proper interpretation of *regulations*. That would directly contradict this Court's precedent and render the statute unconstitutional. *See St. Cyr*, 533 U.S. at 307 (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), for the proposition that habeas review encompasses claim involving proper application of regulations). *See Ramadan*, 479 F.3d at 653-54; *Chen*, 471 F.3d at 327-30.

changed or extraordinary circumstance . . . is a challenge to an exercise of discretion that remains outside our scope of review"). In addition, the Sixth Circuit has also suggested that the application of the filing exceptions to a given case raises unreviewable *factual* issues. *See Almuhtaseb*, 453 F.3d at 748.

4. The divergent views of the courts of appeals cannot be reconciled and there is little likelihood that the disagreements will resolve themselves through further lower court litigation. Each circuit has issued multiple jurisdictional decisions on this issue over the span of a three year period. Nor can there be any question about the importance of the issue given the stakes for asylum applicants and the hundreds of cases in which the issue arises each year.[11]

In short, the jurisdictional split over review of the one-year filing deadline exceptions for asylum applications is independently sufficient to warrant this Court's review. But, as discussed below, the disagreement over the scope of Section 1252(a)(2)(D) is not limited to the asylum context.

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[11] The importance of the issue is not lessened by the fact that withholding has no application deadline. As discussed above, *supra* note 4, and as the court of appeals recognized in this case, App. 5a, the differences between asylum and withholding are significant. Moreover, because withholding has a much higher burden, some aliens would qualify for asylum if permitted to apply but are not able to satisfy the more rigorous withholding standard. The fact that petitioner in this case was able to satisfy the withholding standard means that he would satisfy the asylum standard if allowed to apply.

B. The Conflicting Positions Taken By the Courts Of Appeals On The Scope Of Section 1252(a)(2)(D) Have Broad Implications Beyond Asylum.

Since the enactment of the REAL ID Act, a computerized Westlaw search indicates that the courts of appeals have issued approximately 900 decisions citing to 8 U.S.C. 1252(a)(2)(D). Of these, more than 400 have involved issues other than asylum.

The fact that Section 1252(a)(2)(D) is cited so frequently and broadly is not surprising. Congress enacted dozens of jurisdiction-stripping provisions in 1996. With exceptions immaterial here, each one of these jurisdictional provisions has now been trumped by Section 1252(a)(2)(D). Thus, every time a court of appeals encounters one of the 1996 jurisdiction-stripping provisions, it must determine whether its review has been restored by Section 1252(a)(2)(D), which in turn requires the court to determine the scope of Section 1252(a)(2)(D). Predictably, therefore, the courts of appeals have reached conflicting jurisdictional results in areas outside the asylum context.

For example, an alien's statutory eligibility for a "waiver" of removal generates significant immigration litigation, especially given the frequency with which Congress amends the waiver provisions. *See, e.g., St. Cyr*, 533 U.S. at 314-26 (resolving dispute over retroactive application of the 1996 amendments to the Section 212(c) waiver, now called "cancellation of removal"). Given the fact that the courts of appeals have taken divergent positions

on the scope of Section 1252(a)(2)(D), this waiver litigation has now generated jurisdictional conflicts.

The Seventh Circuit, for example, has held that it has limited review over claims relating to certain waivers in light of its position that Section 1252(a)(2)(D) encompasses only "pure" questions of law. Thus, in a case involving the legal eligibility standards for a cancellation of removal waiver, the Seventh Circuit found that Section 1252(a)(2)(D) did not encompass review "of the *application* of the 'continuous physical presence' standard to the facts of the case." *Cevilla v. Gonzales*, 446 F.3d 658, 661 (7th Cir. 2006) (emphasis in original), *reh'g en banc denied*.

The Fourth Circuit has taken the opposite position. In *Jean*, 435 F.3d at 482, for instance, the Fourth Circuit held that it could review whether the alien in that case had satisfied the statutory eligibility criteria for cancellation of removal, stating that a "determination involving the application of law to factual findings . . . presents a reviewable decision" under the REAL ID Act. *Cf. Pinos-Gonzalez v. Mukasey*, 519 F.3d 436, 439 (8th Cir. 2008) (finding jurisdiction to "review the nondiscretionary determinations underlying a denial of an application for cancellation of removal, such as the predicate legal question whether the IJ properly applied the law to the facts in determining an individual's eligibility.") (internal quotation marks and citation omitted).

Convention Against Torture ("CAT") claims provide a further example of issues impacted by the disagreement over the scope of Section 1252(a)(2)(D). The Seventh Circuit, for instance, has held that

whether a petitioner's evidence of torture satisfies the CAT "more likely than not" legal standard "does not depend upon any constitutional issue or question of law." *Hamid v. Gonzales*, 417 F.3d 642, 647 (7th Cir. 2005).

In contrast, the Third and Ninth Circuits – both of which have held that questions involving the application of law to fact constitute "questions of law" under Section 1252(a)(2)(D) – have exercised review over the application of the CAT "more likely than not" standard to undisputed facts. *See, e.g.*, *Arteaga v. Mukasey*, 511 F.3d 940, 948-49 (9th Cir. 2007) ("Weighing the evidence, the IJ and the BIA agreed that Arteaga did not meet his burden of showing that more likely than not he would be tortured at the hands of the El Salvadoran government if removed. The evidence in the record does not compel a contrary result."); *Toussaint v. Attorney General*, 455 F.3d 409 (3d Cir. 2006) (concluding, in withholding of removal and CAT case, that "we have jurisdiction to review the BIA's application of law to the facts of this case"); *DeAlmeida v. Attorney General*, No. 05-3453, 2007 WL 2050870, at **2, (3d Cir. June 18, 2007) (reviewing and affirming the BIA's conclusion that "undisputed facts in the record did not satisfy the standard for CAT relief," because petitioner had failed to establish a likelihood that he would be imprisoned or tortured); *Badewa v. Attorney General*, No. 06-2858, 2007 WL 3193841 (3d Cir. Oct. 30, 2007), at **4 (reviewing whether the BIA erred in finding that alien "failed to demonstrate that it is more likely than not that the Nigerian government will detain and torture him if he returns"). *See also, e.g.*, *Jean-Pierre v. Attorney General*, 500 F.3d 1315,

1322 (11th Cir. 2007) (concluding that the court had jurisdiction under Section 1252(a)(2)(D) to review noncitizen's CAT claim "in so far as he challenges the application of an undisputed fact pattern to a legal standard").[12]

Thus, the jurisdictional disagreement in the courts of appeals over the scope of Section 1252(a)(2)(D) has broad significance that goes well beyond the asylum context. And, as in the asylum context, the disagreement in these other areas is unlikely to resolve itself. This Court's review is warranted to resolve the disagreement.

II. THE SEVENTH CIRCUIT'S JURISDICTIONAL HOLDING IS INCORRECT.

The court of appeals' view that Section 1252(a)(2)(D) encompasses only "pure" questions of law is incorrect as a matter of statutory interpretation and constitutional mandate. In particular, the court of appeals erred in finding that it could not review whether the asylum filing exceptions were properly applied to petitioner's case.

1. The REAL ID Act was not intended to eliminate any review previously available in habeas. The Conference Report specifically states that the "purpose of [new Section 1252(a)(2)(D)] is to permit judicial review over those issues that were historically reviewable on habeas." H.R. Rep. No. 109-72, 175 (2005). Indeed, the Report expressly

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[12] These cases are consistent with pre-REAL ID Act decisions holding that habeas review encompassed claims involving the application of the CAT "more likely than not" standard to the facts of a given case. *See, e.g., Wang v. Ashcroft*, 320 F.3d 130, 142-43 (2d Cir. 2003); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 222 (3d Cir. 2003).

contrasts the REAL ID Act provisions with the 1996 jurisdiction-stripping amendments and emphasizes that the Act was not intended to "eliminate judicial review, but simply restores such review to its former settled forum prior to 1996." *Id.* *See Chen*, 471 F.3d at 326-27 ("We construe . . . the REAL ID Act . . . to encompass the same types of issues that courts traditionally exercised in habeas review"); *Ramadan*, 479 F.3d at 653-54 (same); *Kamara v. Attorney General*, 420 F.3d 202, 211, 213-15 (3d Cir. 2005) (finding that scope of review under REAL ID Act "mirrors" scope of habeas review).

Because habeas review has traditionally included claims involving both the proper "interpretation" of statutes *and* their "application" (*St. Cyr*, 533 U.S. at 302), Section 1252(a)(2)(D) must be construed to encompass the application of law to fact. *See Ramadan*, 479 F.3d at 652-54 (relying on legislative history and traditional habeas law to conclude that "the phrase 'questions of law' as it is used in . . . the Real ID Act includes review of the application of statutes and regulations to undisputed historical facts"); *Chen*, 471 F.3d at 326-27 (finding that the "application" of statutes and regulations was traditionally reviewable in habeas); *Kamara*, 420 F.3d at 213-15 (3d Cir. 2005) (same).

Given the Suspension Clause and Congress' clear intent to preserve the scope of habeas review, there was no basis for the court of appeals to narrowly construe the reference to "questions of law" in Section 1252(a)(2)(D) to exclude claims involving the application of law to fact. *See St. Cyr*, 533 U.S. at 299-300 (finding it "fairly possible" to construe the 1996 jurisdictional provisions to provide review over the alien's retroactivity claim, emphasizing that this

interpretation avoided the "serious" Suspension Clause issues that would have been triggered by precluding all review over a claim that was traditionally cognizable in habeas); *Ramadan*, 479 F.3d at 652-54 (construing Section 1252(a)(2)(D) to cover claims involving the application of law to fact, stating that "a narrower interpretation would pose a serious Suspension Clause issue"); *Chen*, 471 F.3d at 326-27 (same); *see also* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 139-42 (2006) (to avoid constitutional concerns, the REAL ID Act should be construed to preserve review over claims involving the "application" of legal standards).

In holding that Section 1252(a)(2)(D) applies only to pure questions of law, the Seventh Circuit failed to acknowledge this relevant legislative history, or cite to this Court's decision in *St. Cyr* or the voluminous body of immigration habeas law discussed in *St. Cyr*. In particular, the court of appeals failed to explain whether it believed that habeas review did not traditionally cover claims involving the application of law to fact, or alternatively, that it did not believe that the Real ID Act was intended to preserve review over the types of claims traditionally reviewable in habeas.[13]

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[13] The other circuits that have limited Section 1252(a)(2)(D) to pure questions of law – the Sixth and Tenth Circuits – have been even more cryptic in their analysis. In fact, those circuits relied heavily on the initial decisions issued by the Second Circuit in *Chen* and the Ninth Circuit in *Ramadan*, yet both of those courts, as noted, withdrew their initial decisions on rehearing. *See, e.g.*, *Almuhtaseb*, 453 F.3d at 747-48 (relying on now-withdrawn decisions in *Ramadan* and *Chen*); *Ferry*, 457 F.3d at 1130 (relying on now-withdrawn decision in *Ramadan*).

2. The asylum filing exceptions are also not discretionary, as some courts of appeals have held. *See, e.g.*, *Ferry*, 457 F.3d 1117. The phrase "to the satisfaction" could not have been intended to signal that the Attorney General has unreviewable discretion because that would render those words redundant. Congress included the phrase "to the satisfaction" in other provisions where it also expressly stated that the "Attorney General has sole discretion." *See Ramadan*, 479 F.3d at 655-56 (citing as examples 8 U.S.C. 1182(h)(1)(A) and 8 U.S.C. 1182(a)(9)(B)(v)). Thus, the words "to the satisfaction of the Attorney General" were not intended to vest the Attorney General with unreviewable discretion over the "changed" or "extraordinary" circumstances determination, but rather, to provide an objective standard of proof.[14]

These circuits have declined to revise their own rulings in light of the amended decisions from the Second and Ninth Circuits.

In particular, these courts have relied upon the discussions in the now-withdrawn *Chen* and *Ramadan* decisions regarding the portion of Joint House-Senate Conference Report which noted that the qualifier "pure" was deleted from the final bill because it was viewed as "superfluous". *See, e.g.*, *Almuhtaseb*, 453 F.3d at 747-48 (citing *Chen*'s discussion of the Conference Report). But as the Second and Ninth Circuits subsequently held in their amended decisions, that deletion simply reinforced the Conference Report's observation that courts could review only the "legal elements" of "mixed questions of law and fact." H.R. Rep. No. 109-72, at 175 (2005); *Chen*, 471 F.3d at 325-26 (noting the Conference Report's explanation for the deletion of the word "pure" before "questions of law" but rejecting contention that Section 1252(a)(2)(D) does not encompass the application of law to fact); *Ramadan*, 479 F.3d at 653-54 (same).

[14] Indeed, the relevant regulations and the agency's own training manual show that the phrase designates an objective

Accordingly, the changed and extraordinary circumstances exceptions are not discretionary and may be reviewed under Section 1252(a)(2)(D).

* * * *

The court of appeals erred in holding that it could not review whether the asylum filing exceptions were properly applied to petitioner. Judicial scrutiny of an agency's *application* of a legal standard is critical for effective review of the legal standard itself, particularly in contexts where, as here, a substantive standard is given concrete meaning through case-by-case adjudication. Without such review, an agency could effectively eviscerate a statutory standard by consistently announcing the correct legal rule but de facto applying a standard that is more stringent than the one formally announced.

This case presents an ideal vehicle for resolving the deeply entrenched circuit split at issue here. The Seventh Circuit expressly decided this case on the basis of Section 1252(a)(2)(D). Thus this case will not only allow the Court to resolve the specific disagreement among the courts of appeals regarding their jurisdiction to review the asylum

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standard of proof. *See* Asylum Officer Basic Training Course - One-Year Filing Deadline (Nov. 30, 2001), App. 41a ("The standard of proof to establish changed or extraordinary circumstances is proof to *the satisfaction of the Attorney General*. This is a reasonableness test, i.e., it must be reasonable for the asylum officer, immigration judge, or BIA to conclude that a changed or extraordinary circumstance exists."). The controlling regulations also make clear that the words "to the satisfaction of the Attorney General" should be understood as an objective *standard of proof*. *See* 8 C.F.R. 1208.4(a)(2); 1208.4(a)(5) (formerly at 208.4).

filing exceptions, but also to provide essential guidance on the broader question of the proper scope of Section 1252(a)(2)(D).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

In the
United States Court of Appeals
For the Seventh Circuit

No. 07-1548

ARAMANDO JIMÉNEZ VIRACACHA, *et al.*,

Petitioners,

v.

MICHAEL B. MUKASEY, Attorney General
of the United States,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals.

ARGUED DECEMBER 7, 2007—DECIDED MARCH 3, 2008

Before EASTERBROOK, *Chief Judge*, and MANION and KANNE, *Circuit Judges*.

EASTERBROOK, *Chief Judge*. Armando Jiménez Viracacha arrived in the United States from Colombia in December 1998 with a visitor's visa authorizing a six-month stay. He did not leave when the visa expired. In December 2000 his wife and three children arrived, also holding visitors' visas. They did not leave either. Jiménez sought asylum in 2002 for himself and his family. There is, however, a one-year deadline for requesting asylum, see 8 U.S.C. §1158(a)(2), and Jiménez's application was filed almost three years late. Immigration officials have the authority to allow untimely claims if the delay is justified by changed circumstances, see

§1158(a)(2)(D), 8 C.F.R. §1208.4(a), but the decision whether a change has occurred is committed to agency discretion. 8 U.S.C. §1158(a)(3).

An immigration judge concluded that Jiménez had not established "the existence of changed circumstances which materially affect the applicant's eligibility for asylum", §1158(a)(2)(D). He argued that he fears the Revolutionary Armed Forces of Colombia (FARC), an insurgent group that threatened him with death after he opposed its operations. But because he told the immigration judge that he had left Colombia in 1998 precisely because of the FARC's threats, the IJ found that he should have applied for asylum immediately on arriving in the United States. Jiménez testified that he delayed because he expected the domestic situation in Colombia to improve, but that it had instead (in his view) become worse. The IJ did not see this as an adequate justification, both because conditions in Colombia had not changed materially and because hoping for improvement does not justify delay in filing.

A possibility that Jiménez does not mention—that he waited until his family had reached the United States, lest his application embarrass the family's claim to be tourists who planned to return to Colombia within six months—cannot be ruled out, but it would not justify an exception to the one-year time limit. Jiménez also maintained that he had not understood the asylum process until recently, but the IJ did not see this as the sort of "extraordinary circumstances" that permits a late filing under §1158(a)(2)(D) even when country conditions have not changed materially. The IJ did, however, grant the family's request for withholding of removal on

the ground that they would be in danger from the FARC should they return to Colombia while that nation's civil unrest continues.

Jiménez and his family appealed to the Board of Immigration Appeals, which endorsed the IJ's decision. Next they filed a petition for review in this court, precipitating a series of jurisdictional questions.

The first is whether the BIA's decision is "final," a condition of our jurisdiction under 8 U.S.C. §1252(a)(1). After resolving the Jiménez family's appeal, the Board remanded to the IJ under 8 C.F.R. §1003.1(d)(6) for a background check to ensure eligibility for withholding of removal. The Attorney General contends that this remand makes the BIA's order non-final—and he adds that, because the family did not appeal to the Board from the IJ's order in September 2007 confirming its entitlement to withholding of removal, judicial review is now impossible.

Yet how could the Jiménez family appeal to the Board from a favorable decision? (Recall that the only question the Board instructed the IJ to consider was whether the family remained eligible for withholding of removal.) The Attorney General's position leaves the aliens trapped: They can't seek judicial review of the asylum question because the Board's order is non-final, and they can't seek review of the IJ's decision because it is favorable. This situation is common in administrative law when a court (or appellate body of an agency) remands for consideration of a question different from the one on which judicial review is sought. The normal rule is that the original decision on the only question open

to judicial review is "final." See, e.g., *Forney v. Apfel*, 524 U.S. 266 (1998) (collecting authority). This is an approach that we have applied to immigration proceedings. Take, for example, *Zahren v. Gonzales*, 487 F.3d 1039 (7th Cir. 2007), in which the Board affirmed the IJ's removal order but remanded so that the IJ could decide whether to allow the aliens the privilege of voluntary departure. We concluded that this is a "final" order because the only question within the judicial ken—whether the record supported an order of removal—had been conclusively resolved. Everything that remained was a matter of administrative discretion. Just so here.

Section 1252(a)(1) specifies, as the reviewable action, not simply a "final" order of the Board, but a "final order *of removal*" (emphasis added). We asked the parties whether such an order exists—whether there is even a controversy within the scope of Article III. After all, the IJ allowed the aliens to remain in the United States by granting withholding of removal. How is an order providing that the aliens will *not* be removed a "final order of removal"? And what difference does it make whether the reason why the aliens remain in the United States is a grant of asylum or a decision by the agency to withhold removal? Either way the aliens remain, which is their goal. Where's the controversy? The judicial branch reviews an agency's decision adverse to an applicant, not an agency's statement of reasons for a decision favorable to an applicant.

There is a statutory answer to the question "how can a decision to withhold removal be a final order of removal?" A definitional clause in the statute says that an "order of deportation" (which since 1996 is the same thing as an "order of

removal") means an order of the agency "concluding that the alien is deportable *or* ordering deportation." 8 U.S.C. §1101(a)(47)(A) (emphasis added). The IJ and Board did not "order" the Jiménez family's removal, but they did find the family's members "remov*able*". The family conceded as much: they are citizens of Colombia and lack visas authorizing continuing presence in the United States. Any order withholding removal supposes that the alien is "removable". See *Guevara v. Gonzales*, 472 F.3d 972, 976 (7th Cir. 2007); *Blagaic v. Flagg*, 304 F.2d 623 (7th Cir. 1962). The IJ could have avoided any uncertainty by entering a formal order of removal and then staying its effect by granting the petition to withhold removal, but the absence of this paperwork is not dispositive.

As for the Article III issue: there are enough differences between asylum and withholding of removal to yield a live controversy. One difference is that holders of asylum are entitled to remain in the United States until conditions in their home countries improve or the risk of persecution otherwise declines. Withholding of removal, by contrast, confers not a privilege to remain in the United States but only an immunity against removal to a particular country. See 8 C.F.R. §1208.16(f). An alien still may be removed to any other nation on the list in 8 U.S.C. §1231(b) that is willing to accept him. Another difference is that persons who have been granted asylum may leave the United States and return, while withholding of removal does not permit reentry into this country. Any member of the Jiménez family who leaves the United States will not be allowed back. See 8 C.F.R. §1241.7. Yet another difference is that aliens in asylum status eventually

may become permanent residents. 8 C.F.R. §209.2. Withholding of removal confers no such opportunity. There are more differences, but these three are enough to show that asylum status is more valuable to an alien than withholding of removal, so a real controversy is presented by the Jiménez family's petition for judicial review.

This is as far as we can go, however, because the IJ and BIA enforced against Jiménez the one-year limit on applying for asylum. Section 1158(a)(2) allows the agency to accept untimely applications under certain circumstances, but "[n]o court shall have jurisdiction to review any determination of the [agency] under paragraph (2)." 8 U.S.C. §1158(a)(3). To this exception §1252(a)(2)(D) adds a proviso: "constitutional claims or questions of law" remain reviewable. Jiménez and his family contend that the IJ and BIA erred on a question of law. But both the Board and the IJ stated with precision the rules for exceptions to the one-year deadline. The IJ found that Jiménez had deliberately refrained from making a timely application for asylum, and that any change in conditions in Colombia since then is not material. The first is a conclusion of fact and the second is an application of law to fact; neither rests on or reflects a legal mistake.

Petitioners' position boils down to the contention that every error an agency can make is in the end one of "law"—if, for example, it makes a decision unsupported by substantial evidence, that's an error of law because the law requires agencies to found their decisions on substantial evidence. If this is so, however, then §1158(a)(3) and similar provisions, such as §1252(a)(2)(A), (B), and (C), have been erased from the statute books. They never have

any force; the proviso in subsection (D) covers every case. That can't be right—courts don't read one statute to obliterate others, unless there is no way to make them coexist—and we have held that it is not right, for §1158(a)(3) and §1252(a)(2)(D) in particular. We have dismissed petitions because of §1158(a)(3), see, e.g., *Kaharudin v. Gonzales*, 500 F.3d 619 (7th Cir. 2007); *Nigussie v. Ashcroft*, 383 F.3d 531 (7th Cir. 2004); *Vladimirova v. Ashcroft*, 377 F.3d 690, 695 (7th Cir. 2004), and have held that the proviso in §1252(a)(2)(D) is limited to "pure" questions of law—situations in which a case comes out one way if the Constitution or statute means one thing, and the other way if it means something different. See *Cevilla v. Gonzales*, 446 F.3d 658 (7th Cir. 2006); *Leguizamo-Medina v. Gonzales*, 493 F.3d 772 (7th Cir. 2007).

The Jiménez family asks us to reconsider *Cevilla* in light of later decisions in other circuits. The family relies particularly on *Xiao Ji Chen v. Department of Justice*, 471 F.3d 315, 329-30 (2d Cir. 2006), and *Ramadan v. Gonzales*, 479 F.3d 646 (9th Cir. 2007), which it says allow a court of appeals to review the agency's application to a given situation of a law whose meaning is not contested. The aliens also suggested that the Supreme Court might say something in *Ali v. Achim*, 468 F.3d 462 (7th Cir. 2006), cert. granted, 128 S. Ct. 29 (2007), that would bear on this subject. The writ of certiorari in *Ali* has been dismissed on the parties' stipulation, however, so there is no need to wait further. Nor need we spend time on *Xiao Ji Chen*; the second circuit has since demonstrated that it agrees with *Cevilla*, any dicta in *Xiao Ji Chen* to the contrary notwithstanding. See *Gui Yin Liu v. INS*, 508 F.3d

716 (2d Cir. 2007). That leaves only the ninth circuit's opinion in *Ramadan*.

The panel in *Ramadan* held that §1252(a)(2)(D) authorizes judicial review of all "mixed questions of law and fact", including all applications of law to fact. Only pure findings of fact are outside the scope of subsection (D), the panel concluded. Because no administrative case can be decided without applying some law to some facts, that understanding of §1252(a)(2)(D) vitiates all clauses in the statute, including §1158(a)(3), that limit judicial review of particular classes of decisions. Here, for example, the IJ had to decide whether any change of conditions in Colombia is "material," the sort of question that the Supreme Court treats as one of fact. See *United States v. Gaudin*, 515 U.S. 506 (1995). Cf. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986). The panel in *Ramadan* conceded that §1252(a)(2)(D) does not say that "mixed" or "ultimate" questions are reviewable—and, as we noted in *Cevilla*, the legislative history of §1252(a)(2)(D) is incompatible with extending that proviso beyond pure questions of law—but adopted its interpretation to avoid any need to consider constitutional objections to §1252(a)(2)(D).

It is hard to appreciate what those objections might be; the Constitution itself allows Congress to create exceptions to the jurisdiction of the federal courts. Provisions foreclosing judicial review of particular administrative decisions are common. The most famous such exclusion is in the Administrative Procedure Act of 1946, 5 U.S.C. §701(a)(2) (decisions "committed to agency discretion by law" are not judicially reviewable), and to our knowledge no

serious argument has ever been made that §701(a)(2) is unconstitutional. The Supreme Court has applied it repeatedly without a single Justice expressing doubt about its validity (though there is often debate about whether a given question has been so "committed"). See, e.g., *Lincoln v. Vigil*, 508 U.S. 182 (1993); *Heckler v. Chaney*, 470 U.S. 821 (1985). Given the preservation of legal and constitutional claims in §1252(a)(2)(D), the preclusive effect of §1158(a)(3) is less sweeping than that of the APA. The use that the panel in *Ramadan* was able to make of the "canon of avoiding constitutional questions" shows why many thoughtful people think the canon a bad one—for constitutional questions lurk everywhere, and judges who seek to avoid them can end up rewriting statutes that would be deemed perfectly valid if the question were faced and resolved. See Henry J. Friendly, *Benchmarks* 210 (1967); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 Cornell L. Rev. 831 (2001).

Nine judges dissented from the denial of rehearing en banc in *Ramadan*. 504 F.3d 973 (2007). Judge O'Scannlain's opinion for this group covers all that need be said about the panel's decision. He points out not only some of the problems that we have mentioned, but also the fact that the ninth circuit stands alone: at least eight circuits read §1252(a)(2)(D) as limited to pure questions of law. (Judge O'Scannlain counted only seven; he missed our opinions in *Cevilla* and *Leguizamo-Medina*.) The opinion for the three-judge panel in *Ramadan* does not persuade us that *Cevilla* should be overruled; instead Judge O'Scannlain's opinion for nine judges persuades us that *Cevilla* should not be disturbed.

Section 1158(a)(3) says that we lack jurisdiction. Section 1252(a)(2)(D) does not restore jurisdiction when, as in this case, the governing rules of law are undisputed. The aliens' remaining arguments have been considered but do not require discussion. The petition for review is dismissed for want of jurisdiction.

Appendix B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Chicago, Illinois

FILE A 96 134 970
FILE A 96 134 971
FILE A 96 134 972
FILE A 96 134 973
FILE A 96 134 974

August 31, 2005

In the Matters of

ARMANDO JIMENEZ-VIRACACHA	)	IN REMOVAL
ILYANA MARITZA JIMENEZ-LOPEZ	)	PROCEEDINGS
MARIA PAOLA JIMENEZ-LOPEZ	)	
IRMA YOLANDA JIMENEZ-LOPEZ	)	
ANDRES FELIPE JIMENEZ-LOPEZ	)	
Respondents	)	

CHARGES: Section 237(a)(1)(B) to Section 101(a)(15) of the Act – Remained longer than permitted

APPLICATIONS: Political asylum, withholding, and protection under the Torture Convention; alternatively for voluntary departure

Appendix B

ON BEHALF OF RESPONDENTS:	ON BEHALF OF DHS:
Steven Brown, Esquire	Joseph M. Yeung, Esquire Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondents consist of a family. The principle respondent in this case is Armando Jimenez-Viracacha. He is the father/husband of the family. He will be referred to as the male respondent henceforth. It is through him that the principle claim in the case, namely for political asylum, is transmitted. His experiences form the basis of the claim. His wife, Irma Jimenez-Lopez, will be denominated the female respondent. She did testify in this hearing. The children will not be specifically referred to since their experiences do not support the claim for political asylum.

The male respondent arrived in the United States on December 7, 1998. He had a visitors visa. He was placed under proceedings with a Notice to Appear. It was filed against him in Chicago. He admitted the allegations and conceded the charge. I find that the charge is met in this case, that he has violated his visa by remaining longer than permitted.

In addition, the female respondent and the children also arrived in the United States with visitors visas, however on December 6, 2000, with authorization to remain until June 5, 2001. They do not contest the allegations and concede removability on their charges. I find them all subject to removal.

None of the respondents has designated or chosen a country of removal. Therefore, the Court has designated or chosen Colombia if necessary. See

Section 241(b) of the Act. See also Matter of Linnes, Int. Dec. 3000.

In their application, the respondents claim that they have suffered past persecution and also have a well-founded fear of persecution if returned to Colombia on account of their political opinion and membership in a particular social group. The term "refugee" encompasses a claim based on past persecution or on a well-founded fear of persecution because of race, religion, nationality, membership in a particular social group, or political opinion. The burden of proof is on the respondents.

THE EVIDENCE

The Male Respondent's Testimony

The male respondent testified on March 16, 2005 to the following:

He testified that he left Colombia on December 7, 1998 because he was confronted by the FARC, who made attempts on his life. On cross-examination, he was asked whether the same experiences occurred to his extended family members, in other words, to his siblings. He admitted that he had two brothers and three sisters. A brother, Walter, works for a company regarding public transportation. Richard, who is 38 years old, works as a marketing advisor in Colombia. Adriana lives in Bogota and is 27 years of age. He admitted that they were all raised by the respondent's stepfather.

The respondent was questioned about his intentions on his arrival in the United States in 1998. He acknowledged that he did arrive with a tourist visa, but claimed that he intended to stay

only three or four months. But he claimed that that changed radically because of the situation. He described the situation as changing for the worst. He claimed that initially he had faith in the peace process by then-President Pastrana. But he claimed that when the peace process and its program advocated by President was not giving results, he lost his faith in that process.

Respondent, in addition, testified about a number of threats which he experienced in Colombia. He claimed that he was assaulted after being detained by members of FARC. On September 23, 1998, he claimed that men on motorbikes stopped him, putting a gun to his head. After his release and after his brief detention, he filed a complaint. He has incorporated the complaint as part of Exhibit 5.

The respondent's spouse also testified. The female respondent testified that her husband told her that after he had left for work one day, that is, in September 23, 1998, he was intercepted by men on a motorcycle and that they put a weapon to his head. In addition, she testified that on November 28, 1998, she received phone calls again asking her about him. The men who called identified themselves as members of FARC, according to the female respondent.

She testified that even after he left Colombia, she continued to receive phone calls threatening the family and asking for the male respondent. She cited those as ones she received in March 1999 in which she told the caller that her husband was out of the country. She claimed that the caller told her that were he to return to Colombia, he would be killed. She claimed that the calls continued in June 1999

and that she received a number of calls in 2000. She claimed they would call her and they would hang up.

The respondent presented an expert witness, Professor Herbert Braun, who testified telephonically today. He presented his curriculum vitae and also an affidavit. He was recognized by a stipulation of the parties as an expert on the history of Colombia and also on current conditions there. He claimed he had written a book describing violence in the 1950's. He described the FARC as comprised of 70 different connected cells, which have become immensely wealthy from narco-trafficking and have merged with criminal gangs. He further described the FARC as an organization which has no formal induction ceremony.

In addition, he was asked "How did the FARC behave in the first few years of this decade?' He answered that in 2000, 2001, and 2002, its influence has "waxed and waned." He claimed that there has been an increase of violence and that the FARC seeks to intimidate and humiliate those it perceives as threats to them. He described the threats as being "lob-like," creating a "pervasive situation." Finally, he averred that if the respondents were to live in another city away from where they were before, they would have to live very secretive lives and that they would be very intimidated. He implied that that was not a realistic option for them if they were returned to Colombia.

Other Evidence

The respondent has presented documents in support of his claim. Of particular note are those in Exhibit 5. He has presented statements, in Exhibit

5, Item 22-A, attesting to reports that he made after the September 24, 1998 incident.

I have also reviewed the statement from the respondent's stepfather, Jay Gilberto Hernandez, in which he states that the male respondent was involved in his campaign and, in addition, that he left in order to look for new horizons and in order to protect his life and seek a better future for his children.

ANALYSIS

The One-Year Bar

It is clear that the respondent has not filed an application for asylum within one year of his arrival. The application was filed in September 2002.[1] The respondent claims that his failure to file the application is excusable because there were extraordinary circumstances which excepted him from the one-year bar and that, in addition, there were material changes in country condition. His advocate states that in the beginning in 2000, "a quasi near-exponential increase in violence practiced by the FARC" created a material change in country conditions.

The term changed conditions is described with examples in 8 C.F.R. Section 1208.4. "Changed conditions" refers to circumstances materially affecting the applicant's eligibility for asylum. They may include but are not limited to: (a) changes in conditions in the applicant's country; (b) changes in the applicant's circumstances that materially affect the applicant's eligibility for asylum. Further, see

[1] The specific date of receipt of the application was September 25, 2002. See Exhibit 2, page one.

(ii), the applicant shall file an asylum application within a reasonable period given those changed circumstances.

The term extraordinary circumstances adds to but opens another area in the exception. It must refer to events or factors directly related to failure to meet the one-year filing deadline and describes those circumstances as including but not limited to: serious mental illness or a serious physical disability, a legal disability, ineffective assistance of counsel, or a legal status such as temporary protected status of counsel, or a legal status such as temporary protected status or lawful immigrant or non-immigrant status, et cetera. It may include the death or serious illness or incapacitation of the applicant's legal representative or member of the applicant's immediate family.

The respondent testified that he came to United States with the intention of visiting for three or four months and expressed a desire to go to Disney World and with the hope that the peace process at that time, that is, in 1998, instituted by President Pastrana would bear fruit. It was only when it did not that he applied for asylum.

I have concluded that the respondent has not established material change in country conditions or extraordinary circumstances in this case to qualify for an exception to the one-year bar. My reasons are as follows:

First, the respondent has testified that he entered the United States with the purpose of staying for only three or four months. By implication, that suggests that he was willing to return after that period. His reliance on the peace process as providing security for him on his return to

Colombia is belied by the historical record in which the peace process, that is, the Pastrana peace process, was never credited by most informed observes with having even a 50 percent chance of success. History has certainly verified that assessment.

In addition, even if one were to accept for the sake of argument the respondent's contention that he relied on the Pastrana peace initiative, that is, setting up a separate safe haven for the FARC guerillas in San Juan de Calle Guan as a basis for meaningful peace in Colombia, it is unclear why he would have decided in September 2002 that that process was over. There were many indications prior to that time that the process had failed: Mr. Marulanda's, the head of FARC, failure to meet with the president, the increase of violence cited by the respondent's own expert. So there's no correlation between the respondent's decision to file and filing of the application in September 2002 with his stated reasons for delay.

In addition, there is nothing that in my assessment rises to the level of an extraordinary circumstance in the respondent's experience in the United States. He claims that unnamed representatives suggested to him that he didn't have to apply for asylum and that he decided only later to do so. Yet, when contrasted with the reasons or examples given in the regulations, these justifications pale significantly. They are certainly not similar to serious illness or legal disability or ineffective assistance of counsel or death, serious illness, or incapacity of the applicant's legal representative. Although the list isn't all-inclusive, the seriousness of such disabilities, either physical or

legal, are clear. The respondent is suffering from no such disability. He's a middle-class person, obviously well-educated, certainly well-schooled. The explanations in my assessment that he's offered are more similar to excuses than justifications for delay.

As far as the material change in country conditions is concerned, I don't find that that provides the respondent with support. No one can deny that there were many significant developments in Colombia during the period from December 1999, if one calculates failure to file from that date forward, to when he did file in September 2002. The question is whether they changed the circumstances in such a way as to cause a new situation to exist, one that hadn't existed during the period in which the respondent was obligated to file, that is, between December 1998 and December 1999. I do not believe that that is so.

What is clear is that the civil war which had existed for many years prior to that date in Colombia continued and intensified. There was of course and has been a change of administration. Different leaders have been elected. However, the conflict has remained essentially the same, namely that the guerillas, led by Mr. Marulanda, with a sizeable following and a sizeable armed force, together with other guerilla movements, are endeavoring to overthrow or to sabotage the legally constituted government. There of course is another group, the paramilitaries, which have recently been amnestied by the Colombian government. But they are not implicated in this claim.

During the period that the respondent should've filed and failed to file the application, that

conflict continued. Essentially, the nature of the conflict did not change. The government, the same government, in fact the same administration remained in power. Consequently, for these reasons, I have concluded that there were no material changes in country conditions or in the respondent's circumstances which materially affected his eligibility for asylum which excuse his failure to comply with the one-year deadline.

Having concluded that the respondent is barred for political asylum because he failed to file his application, I must consider his application on the merits. The Department of Homeland Security contends that the application fails, that the respondent was not "targeted for political reasons" and "the incidents described have more to do with criminal reasons than with political reasons." Therefore, there is no nexus between a required ground and the respondent's claims of mistreatment or persecution. This is exemplified by the number of his extended family members who are still living in Bogota and who have not been either threatened or actually mistreated.

In contrast, the respondent contends that he has met the requirement for withholding because he has shown past persecution and that in the 7th Circuit, that requirement or that condition for a grant of withholding is met by a showing of "more than mere harassment" and that "mere threats alone would do it" and that since the family has been exposed to more than mere harassment, they have established that their return to Colombia would cause them persecution and, in addition, they have established past persecution, which requires that the Department of Homeland Security present evidence

to over come that presumption, that is, the presumption of a well-founded fear of future mistreatment.

This Court disagrees with the respondent's assessment of the jurisprudence on past persecution. In a recent decision by the 7th Circuit Court of Appeals, it described examples where past persecution was found. See Dandan v. Ashcroft (7th Cir. August 11, 2003). In that case, where the 7th Circuit concluded that the applicant had not shown past persecution, it cited to cases where "past persecution" was found. For example, at page 10 of Dandan, it cited to Asani, where it held that "being detained and beaten by the police, who in the process kicked out Asani's teeth, was sufficient to show past persecution."

In addition, "This court agreed with the BIA's finding in Baduva, that a single beating in which a petitioner was punched and had his face bruised and his finger broken constituted past persecution." The court went on to say, "We do not hold that lost teeth or broken bones are the sinaquenon of persecution. But these specifics indicate the severity of the beating and support its claim to be considered persecution." See Dandan, at page 11. In this case, the respondent is complaining and has testified about a detention. The detention was brief and he was released without harm. He contends that the pointing of a gun to his head constitutes torture. I disagree. I do not think that the jurisprudence supports hi contention in that regard.

Having concluded that the respondent has misstated past persecution, I must continue to assess the sufficiency of the evidence in this case and

determine whether he has established a clear probability of persecution. For the following reasons, I concluded that he has established a clear probability of persecution on account of political opinion:

That was certainly the opinion first of his expert. It is uncontested that in November 1998, he was shot at by members of the FARC because of his political activism on behalf of his stepfather. Additionally, he received numerous threats from FARC members in 1998 because of this political activism. Thus, there is a clear pattern of intimidation against the respondent as a result of this activism.

It is worth noting that he professed an intention to continue supporting his work, that is, his stepfather's work against the FARC. Although approximately seven years have elapsed since the male respondent's departure from Colombia, if he returned and continued to campaign against the FARC, that very activity, which caused the FARC to target him before hi departure, would likely engender the same response of threats. Therefore, the FARC's ongoing presence in Colombia, its undisputed attempts on the respondent's life, at least threats to him in 1998, and finally his intention of returning to political activism in Colombia were he sent back there give rise to the realistic likelihood that he will be mistreated because of his political opinion.

For the purpose of this analysis, I have and must assess the respondent's credibility. What little I can say about that is that there were no important inconsistencies between the respondent's testimony

and the affidavit that he presented. He has presented some evidence, that is, statements, attesting to the complaints that he made in 1998 after the events in September and November 1998. He has also presented a statement from his stepfather attesting to his work with him on his campaigns.

I disagree with the Department's contention that the incidents have more to do with criminal than with political reasons. The respondent, if his testimony is believed, had an adversary not in a common criminal, but in a large organization with capacity to inflict serious harm on him and his family. This is not a petty criminal or an individual acting for the reasons of material gain alone, interested only in appropriating its victim's property, but rather an organization which had a political agenda. Of course, the existence of a political agenda on the part of the persecutor is not in itself sufficient to establish the nexus, but rather it must be shown that the victim's or the applicant's political beliefs as manifested in the applicant's actions engendered the mistreatment. I believe that the respondent has shown that in this case. It's for that reason that I'm granting him withholding of removal.[2]

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[2] Having decided to grant the respondent withholding of removal, I will of course not order him removed. Although in the some cases the Department has insisted that the Court designate a country of removal, I agree to designate Colombia. As I understand it, the Department claims that they have the right to try to find a country other than Colombia to send the respondent. In addition, the withholding of removal to Colombia in my view makes moot the request for voluntary departure since there is no order entered directing the respondent's or applicant's expulsion to the country of his citizenship.

In summary, I have concluded that the respondent has established eligibility and qualifies for withholding of removal and has established a clear probability of persecution for his political opinions.[3]

Finally, turning to protection under the Convention Against Torture. The respondent contends that he was tortured. I disagree. First, I do not think that the respondent's experiences rise to the level of torture as expressed in Article 1 of the Convention Against Torture. See the definition of torture. Secondly, the torture that the respondent or mistreatment that the respondent contends rises to the level of torture was not inflicted by a government. In Matter of S-V-, the Board has held that to qualify for protection under the Torture Convention, the torture must be inflicted by the government and not by a third-party.

The Board has specifically rejected the contention that if mistreatment is caused by a third-party, then the government, because the torture occurred, has implicated the mistreatment. The respondent contends in contrast that the "acquiescence of the Colombian government" is manifested by its allowance of the types of mistreatment that the respondent experienced in Colombia. The 7th Circuit case law does not support the respondent's position. For example, in Roman v. INS (7th Cir. December 5, 2000), the court stated, "An applicant must show that the government condoned it or at least demonstrated a complete

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[3] The respondent has not developed the issue of whether he belongs or is a member of a particular social group. He hasn't defined a social group. He hasn't shown how he is a part of it. See Nguyen v. INS (8th Cir. January 1998).

helplessness to protect the victims, citing Galina v. INS, 213 F.3d 955 (7th Cir. 2000)." In Galina v. INS (7th Cir. May 22, 2000), the court held at page three, "Since a finding of persecution ordinarily requires a determination that government authorities, if they did not actually perpetrate or incite the persecution, condoned it or at last demonstrated a complete helplessness to protect the victims."

In this case, it cannot be said by informed observers (see the State Department's Country Reports from 1998 to 2004) that the government of Colombia has been helpless or condoned the violence of the FARC guerillas or the ELN guerillas or the paramilitaries. In fact, the historical record shows that the Colombian government, by whatever administration, by whatever political opinion, has sought to control the country and reduce the level of conflict. Their inability to do so does not indicate that they are complicit in that violence. Based on the BIA jurisprudence and the case law in the 7th Circuit and also on the definition of torture contained in the Torture Convention, I find that the respondent does not qualify under those provisions of the Torture Convention.

As noted, voluntary departure is moot in this case.

Accordingly, the following orders are entered:

ORDER

IT IS ORDERED that the respondent's applications for political asylum be denied.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal be granted.

IT IS FURTHER ORDERED that the request for protection under the Torture Convention be denied.

_____

CRAIG M. ZERBE

U.S. Immigration Judge

Appendix B

CERTIFICATION PAGE

I hereby certify that the attached proceeding before CRAIG M. ZERBE, in the matter of:

ARMANDO JIMENEZ-VIRACACHA

A 96 134 970

Chicago, Illinois

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Noreen D. Badua (Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

May 5, 2006
(Completion Date)

Appendix C

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Files: A96 134 970 – Chicago Date: Feb 13, 2007
A96 134 971
A96 134 972
A96 134 973
A96 134 973
A96 134 974

In re: ARMANDO JIMENEZ VIRACACHA
ELIANA MARITZA JIMENEZ LOPEZ
MARIA PAULA JIMENEZ LOPEZ
IRMA YOLANDA JIMENEZ LOPEZ
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IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Stephen J. Brown, Esquire

CHARGE:

Notice: Sec. 237(A)(1)(B), I&N [8U.S.C. § 1227(a)(1)(B)] –

In the United States in violation of law (all respondents)

APPLICATION: Asylum

ORDER:

PER CURIAM. In a decision dated August 31, 2005, an Immigration Judge found that the respondents established their eligibility for withholding of removal, but denied their applications for asylum and protection under the Convention

Against Torture. The Immigration Judge found that the respondents were statutorily ineligible for asylum relief because the lead respondent failed to establish by clear and convincing evidence that he filed his asylum application within 1 year of his last arrival in the United States, and also failed to demonstrate changed or extraordinary circumstances such as to qualify for an exception to the filing deadline. *See* sections 208(a)(2)(B), (D) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a)(2)(B), (D); 8 C.F.R. § 1208.4(a). On appeal, the respondents argue, among other things, that the Immigration Judge erred by finding that the circumstances of the respondents' case do not fall within an exception to the filing deadline.

Upon review of the record of proceedings, we adopt and affirm the decision of the Immigration Judge to the extent that he denied the respondents' claim for asylum on the basis of the lead respondent's failure to timely file his application for asylum,[3] and found that he failed to establish the existence of extraordinary or changed circumstances such as to exempt him from the time bar (I.J. at 6-10). *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his

[3] On appeal, the lead respondent conceded that his application was filed beyond the 1-year filing deadline, and only argues that he qualifies for an exception to that deadline. *See* Respondents' Brief at 2.

or her decision"); sections 208(a)(2)(B), (D) of the Act; 8 C.F.R. § 1208.4(a).

In reaching this conclusion, we note that we are not persuaded by the respondents' argument that the Immigration Judge's decision must be reversed because he misstated certain facts.[4] We agree with the Immigration Judge's determination that, based on the evidence of record, the respondents have failed to establish the existence of extraordinary or changed circumstances. *See* 8. C.F.R. § 1208.4(a).[5]

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[4] The respondents contend that the Immigration Judge was inaccurate in his description of the lead respondent's objective in traveling to the United States (Respondents' Brief at 6-7). Regardless of the lead respondent's initial reason for obtaining a visa, the record clearly indicated that he traveled to the United States as a result FARC's threats and activities. The Immigration Judge's decision addresses the threats, and clearly considered such threats substantial and credible as evidenced by his grant of withholding of removal. Further, regardless of the length of time that the lead respondent "intended" to stay, or "did not want to stay any longer than" (Respondents' Brief at 7), the fact remains that the lead respondent did not initially file for asylum because he hoped conditions would improve in his native country. We find that the outcome of the Immigration Judge's ultimate determination is not affected by the above discrepancies, not by the other factual distinctions as described by the respondents: including, the description of the level of the lead respondent's education, and the name of a United States Congressman. *See* Respondents' Brief at 7-8.

[5] Contrary to the respondents' suggestion, we find that the Immigration Judge's decision does not reveal that the Immigration Judge applied an incorrect standard in evaluating whether the respondents established an exception to the 1-year filing deadline. *See* Respondents' Brief at 8-9. The Immigration Judge cited the correct regulation in discussing changed and extraordinary circumstances (I.J. at 7), 8 C.F.R. § 1209.4, and there is no indication that he applied the "clear and convincing" standard to his analysis of the filing deadline

Accordingly, we agree that the lead respondent did not timely file his asylum application and that the respondents are statutorily ineligible for asylum.

On appeal, the respondents argue that certain "administrative problems"—including a 50-minute delay in starting their merits hearing, the inability to present a witness by telephone, the Immigration Judge's "urging" to accept a second hearing to complete the proceedings, and various interruptions by the Immigration Judge – resulted in a violation of their due process. *See* Respondents' Brief at 17-20. In this matter, considering the totality of the circumstances we find that the respondents have been afforded "a meaningful opportunity to be heard," and have failed to establish a due process violation. *See Kerciku v. INS*, 314 F.3d 913, 917 (7th Cir. 2003). Moreover, to prevail on a due process claim, the respondents must show prejudice. *See Mojsilovic v. INS*, 156 F.3d 743, 749 (7th Cir. 1998); *Shahandeh-Pey v. INS*, 831 F.2d 1384, 1389 (7th Cir. 1987) (alien must produce concrete evidence that violation of procedural protection actually had potential to affect the outcome of the deportation proceedings). We find that the respondents have failed to establish that the "administrative problems" affected the determination of whether they

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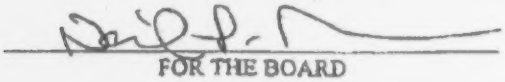
exceptions. In addition, although the respondents argue that the Immigration Judge improperly limited the time-frame of his inquiry of changed circumstances (Respondents' Brief at 9-10), our review of the record also indicates that respondents have failed to establish the existence of extraordinary or changed circumstances, since the time the lead respondent entered the United States until present. As discussed herein, we find that the respondents have not established to our satisfaction that they qualify for an exception to the 1-year deadline. *See* C.F.R. § 1208.4(a)(2)(i)(B).

established an exception to the filing deadline to the satisfaction of the Immigration judge, or to our satisfaction. *See* 8 C.F.R. § 1208.4(a)(2)(i)(B). In addition, we find no support for the respondents' suggestion that the Immigration Judge ignored certain testimony and evidence in reaching his conclusion. *See* Respondents' Brief at 12-15. Thus, their claim that the Immigration Judge violated due process is without merit.

Accordingly, the respondents' appeal is dismissed.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R § 1003.47(h). *See* Background and Security Investigations in Proceedings Before Immigration Judge and the Board of Immigration Appeals, 70 Fed. Reg. 4743, 4752-54 (Jan. 31, 2005).



FOR THE BOARD

Appendix D

Constitutional, Statutory and Regulatory Provisions Involved

Suspension of Habeas Corpus Clause of the Constitution, Art. I, § 9, Cl. 2

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

* * * *

8 U.S.C. 1158(a)(2)

(2) Exceptions

(A) Safe third country

Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

* * * *

8 U.S.C. 1158(a)(3)

(3) Limitation on judicial review

No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

* * * *

Appendix D

8 U.S.C. 1252(a)(2)(D)

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * * *

8 C.F.R. § 208.4(a)(2):

(2) One-year filing deadline.

(i) For purposes of section 208(a)(2)(B) of the Act, an applicant has the burden of proving:

(A) By clear and convincing evidence that the application has been filed within 1 year of the date of the alien's arrival in the United States, or

(B) To the satisfaction of the asylum officer, the immigration judge, or the Board that he or she qualifies for an exception to the 1-year deadline.

(ii) The 1-year period shall be calculated from the date of the alien's last arrival in the United States or April 1, 1997, whichever is later. When the last day of the period so computed falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or legal holiday. For the purpose of making

determinations under section 208(a)(2)(B) of the Act only, an application is considered to have been filed on the date it is received by the Service, pursuant to § 103.2(a)(7) of this chapter. In a case in which the application has not been received by the Service within 1 year from the applicant's date of entry into the United States, but the applicant provides clear and convincing documentary evidence of mailing the application within the 1-year period, the mailing date shall be considered the filing date. For cases before the Immigration Court in accordance with § 3.13 of this chapter, the application is considered to have been filed on the date it is received by the Immigration Court. For cases before the Board of Immigration Appeals, the application is considered to have been filed on the date it is received by the Board. In the case of an application that appears to have been filed more than a year after the applicant arrived in the United States, the asylum officer, the immigration judge, or the Board will determine whether the applicant qualifies for an exception to the deadline.

* * * *

8 C.F.R. § 208.4(a)(5)

(5) The term "extraordinary circumstances" in section 208(a)(2)(D) of the Act shall refer to events or factors directly related to the failure to meet the 1-year deadline. Such circumstances may excuse the failure to file within the 1- year period as long as the alien filed the application within a reasonable period given those circumstances. The burden of proof is on the applicant to establish to the satisfaction of the asylum officer, the immigration judge, or the Board

of Immigration Appeals that the circumstances were not intentionally created by the alien through his or her own action or inaction, that those circumstances were directly related to the alien's failure to file the application within the 1-year period, and that the delay was reasonable under the circumstances. Those circumstances may include but are not limited to:

(i) Serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival;

(ii) Legal disability (e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival;

(iii) Ineffective assistance of counsel, provided that:

(A) The alien files an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard;

(B) The counsel whose integrity or competence is being impugned has been informed of the allegations leveled against him or her and given an opportunity to respond; and

(C) The alien indicates whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not;

(iv) The applicant maintained Temporary Protected Status, lawful immigrant or nonimmigrant status, or was given parole, until a reasonable period before the filing of the asylum application;

(v) The applicant filed an asylum application prior to the expiration of the 1- year deadline, but that application was rejected by the Service as not properly filed, was returned to the applicant for corrections, and was refiled within a reasonable period thereafter; and

(vi) The death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family.

Lesson Plan Overview

Course	Asylum Officer Basic Training
Lesson	***One-Year Filing Deadline***
Field Performance Objective	Given an asylum application to adjudicate in which the one-year filing deadline or a previous denial is at issue, the asylum officer will be able to properly apply the rules and reach a decision.
Interim (Training) Performance Objectives	1. Identify whether the one-year filing rule applies. 2. Correctly use the clear and convincing evidentiary standard. 3. Explain the exceptions to the one-year filing rule. 4. Identify facts material to the filing rule in evaluating credibility.
Student References / Materials	INA §§ 208(a); 101(a)(42); 8 C.F.R. § 208.4(a).

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C. Burden and Standard of Proof

OH #18: Burden and Standard of Proof

1. Applicant's burden

The burden of proof is on the applicant to establish the existence of a changed circumstance materially affecting eligibility for asylum or of an extraordinary circumstance related to the applicant's failure to apply for asylum within one year from the last arrival.

2. Standard of proof

The standard of proof to establish changed or extraordinary circumstances is proof to *the satisfaction of the Attorney General.* This is a reasonableness test, i.e., it must be reasonable for the asylum officer, immigration judge, or BIA to conclude that a changed or extraordinary circumstance exists. This is a lower standard of proof than the "clear and convincing" standard that is required to establish that the applicant timely filed.

INA § 208(a)(2)(D); *See*, lesson, *Eligibility Part IV: Burden of Proof and Evidence.*

Appendix E
Asylum Manual

3. Evidence

Generally, asylum officers must consult country conditions information relevant to the applicant's claim to determine whether there are changed country conditions material to the applicant's eligibility for asylum.

This, of course, would not apply to the changed condition based on a dependent reaching 21 years of age.

While the burden of proof is on the applicant to show that there are changed circumstances that now materially affect his or her eligibility for asylum, many applicants affected by changed circumstances may not be able to articulate this. The unique nature of assessing an applicant's need of protection places the officer in a "cooperative" role with the applicant. It is an asylum officer's affirmative duty "to elicit all relevant and useful information bearing on the applicant's eligibility for asylum."

See, lesson, *Country Conditions Research and the Resource Information Center ("RIC")*

UNHCR *Handbook*, para. 196; *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997); 8 C.F.R. § 208.9(b)

Asylum officers must be flexible and inclusive in examining changed or extraordinary circumstances, if credible testimony or documentary evidence relating to an exception exists. Documentary evidence includes country conditions and legal information that the asylum officer researches and uses.

Fed. Reg. comments on proposed rule, 3/6/97; comments by Senators Hatch and Abraham shortly before passage of IIRIRA that indicate legislative intent for

exceptions to cover a broad range of circumstances. 142 Cong. Rec. S11840, 9/30/96.

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No. 07-1363

In the Supreme Court of the United States

ARMANDO JIMENEZ VIRACACHA, ET AL., PETITIONERS

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a decision of the Board of Immigration Appeals remanding a case to an immigration judge for additional proceedings that are prerequisites to the grant or denial of relief constitutes a "final order of removal" under 8 U.S.C. 1252(a).

2. Whether the court of appeals correctly held that it lacked jurisdiction to review the Board of Immigration Appeals' conclusion that the lead petitioner failed to establish "changed circumstances" or "extraordinary circumstances" to excuse the untimely filing of his asylum application.

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In the Supreme Court of the United States

No. 07-1363

ARMANDO JIMENEZ VIRACACHA, ET AL., PETITIONERS

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 518 F.3d 511. The decisions of the Board of Immigration Appeals (Pet. App. 28a-32a) and the immigration judge (Pet. App. 11a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2008. The petition for a writ of certiorari was filed on April 28, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Attorney General—and, now, the Secretary of Homeland Security—may, in his discretion, grant asylum to an alien

who demonstrates that he is a "refugee" within the meaning of the INA. 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). The applicant bears the burden of demonstrating that he is eligible for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d).

Withholding of removal is available if the alien demonstrates that his "life or freedom would be threatened" in the country of removal "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). To satisfy that standard, the alien must prove a "clear probability of persecution" upon removal, a higher standard than that required to establish asylum eligibility. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-432 (1987). As with asylum, the applicant bears the burden of establishing that he is eligible for withholding of removal. 8 C.F.R. 1208.16(b), 1240.8(d).

b. An alien who wishes to be granted asylum must file his application within one year of arriving in the United States. 8 U.S.C. 1158(a)(2)(B). An alien who fails to meet that requirement "may be considered" for asylum if he demonstrates "to the satisfaction of the Attorney General" or the Secretary of Homeland Security either the existence of "changed circumstances" that materially affect his eligibility for asylum, or "extraordinary circumstances" that excuse his failure to file the application within the one-year period. 8 U.S.C. 1158(a)(2)(B) and (D). The applicant bears the burden of demonstrating, "by clear and convincing evidence,"

that his application for asylum was filed within one year of his entry into the United States. 8 U.S.C. 1158(a)(2)(B); 8 C.F.R. 1208.4(a)(2).

The Attorney General, who is responsible for adjudicating asylum applications filed by aliens in removal proceedings, 8 U.S.C. 1158(d)(1), has defined the term "changed circumstances" by regulation to include, *inter alia*, "[c]hanges in conditions in the applicant's country of nationality." 8 C.F.R. 1208.4(a)(4)(i)(A). The Attorney General has defined "extraordinary circumstances" as personal circumstances "directly related to the failure to meet the 1-year deadline" that "were not intentionally created by the alien through his or her own action or inaction," including, *inter alia*, "[s]erious illness or mental or physical disability," "[l]egal disability," and "[i]neffective assistance of counsel." 8 C.F.R. 1208.4(a)(5). In addition to showing "changed circumstances" or "extraordinary circumstances," the applicant must show that he filed his asylum application within a reasonable period of time given those circumstances. 8 C.F.R. 1208.4(a)(4)(ii) and (5).

c. Under the INA, "[n]o court shall have jurisdiction to review any determination of the Attorney General" regarding the timeliness of an asylum application, including a determination regarding whether the changed or extraordinary circumstances exception applies. 8 U.S.C. 1158(a)(3). In 2005, Congress amended one subsection of the judicial review provision of the INA, 8 U.S.C. 1252(a)(2), to include the following provision:

> Nothing in subparagraph (B) or (C), or in any other provision of this Chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for

review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.

2. Petitioners are natives and citizens of Colombia. Pet. App. 1a. Lead petitioner Armando Viracacha (petitioner) was admitted to the United States as a non-immigrant visitor in December 1998, and his wife and children (petitioners Irma Yolanda Jiminez, Eliana Maritza Jimenez, Maria Paula Jimenez, and Andres Felipe Jimenez) were admitted as non-immigrant visitors in December 2000. *Ibid.*[1] Each of them had permission to remain in the United States for only six months, and each remained in the United States beyond that authorized time. *Ibid.*

In September 2002, petitioner filed an asylum application. Pet. App. 16a. He claimed that he had been persecuted in Colombia by the Revolutionary Armed Forces of Colombia (FARC) and that he would be persecuted by the FARC if he returned to Colombia. *Id.* at 1a. An asylum officer determined that petitioner's asylum application was untimely and referred him to an immigration judge (IJ) for a removal proceeding. A.R. 1112-1113.

Before the IJ, petitioner conceded removability and sought asylum, withholding of removal, and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treat-

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[1] This brief generally refers only to the lead petitioner, because the other petitioners' claims are entirely derivative of his claims for relief. See Pet. 8 n.5; Administrative Record (A.R.) 1064-1065; see also 8 U.S.C. 1158(b)(3)(A) and (B).

ment or Punishment (CAT), *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85. Pet. App. 11a-12a. In support of his claims, petitioner explained that, with an estimated membership of 17,000 in 2002, FARC was the "largest and most active" guerilla group in Colombia. A.R. 639, 1063-1072. He alleged that FARC guerillas put a gun to his head and threatened to kill him and made threatening telephone calls to his home because of his and his stepfather's political activism. Pet. App. 14a, 22a. Petitioner also claimed that the threatening phone calls to his family continued after he left Colombia in December 1998. *Id.* at 14a. Petitioner alleged that he planned to visit the United States for three or four months, but stayed beyond that time because the peace process instituted by the then-President of Colombia did not bear fruit. *Id.* at 17a.

The IJ found petitioner removable as charged, denied his claims for asylum and protection under the CAT, and granted him withholding of removal. Pet. App. 11a-27a. The IJ first determined that each of the petitioners remained in the United States beyond the time authorized and that, therefore, they were "all subject to removal." *Id.* at 12a.

The IJ rejected petitioner's asylum claim as untimely. Pet. App. 16a-20a. He noted that petitioner "has not filed an application for asylum within one year of his arrival" in the United States, because he arrived in the United States in December 1998, but he did not file his application until September 2002, which was nearly four years later. *Id.* at 12a, 16a.

The IJ then held that petitioner had failed to demonstrate either "changed circumstances" or "extraordinary circumstances" to justify his untimely filing. Pet. App. 16a-20a. The IJ first rejected petitioner's contention

that he showed "changed circumstances"—specifically, a material change in conditions in Colombia—that justified his late filing, explaining that there was "no correlation between [petitioner's] decision to file" his asylum application and changes in conditions in Colombia. *Id.* at 18a. Indeed, the IJ observed, from the time petitioner should have filed his asylum application to the time he actually did, the civil war in Colombia continued, "the nature of the conflict did not change," and the "same administration remained in power." *Id.* at 19a-20a.

The IJ then rejected petitioner's contention that "extraordinary circumstances" excused his late filing. Pet. App. 18a. The IJ noted that "extraordinary circumstances" generally include significant factors in the applicant's personal circumstances or experience, such as mental or physical or legal disability, that would justify the delay in filing. *Ibid.*; see 8 C.F.R. 1208.4(a)(5). The IJ explained that petitioner did not claim any type of serious disability; he merely stated that "unnamed representatives suggested to him that he didn't have to apply for asylum" and that he decided only later to do so. Pet. App. 18a. Because that justification "pale[d] significantly" when "contrasted with the reasons or examples given in the regulations," the IJ concluded that petitioner failed to provide any "extraordinary circumstances" to justify his late filing. *Id.* at 18a-19a.

The IJ then granted petitioner withholding of removal, concluding that petitioner established "a clear probability of persecution [by the FARC] on account of political opinion." Pet. App. 22a. The IJ denied petitioner CAT protection, explaining that his past experiences do not "rise to the level of torture" and that any past mistreatment was not inflicted by the Colombian

government or with government acquiescence. *Id.* at 24a-25a.

4. The Board of Immigration Appeals (BIA) affirmed and remanded. Pet. App. 28a-32a.[2] It noted that petitioner "conceded that his application was filed beyond the 1-year filing deadline," and it "agree[d] with the Immigration Judge's determination that, based on the evidence of record, [petitioners] have failed to establish the existence of extraordinary or changed circumstances." *Id.* at 29a-30a & n.3. The BIA determined that the IJ applied the correct legal standard in assessing whether an exception to the one-year deadline was warranted, and that its own review of the record "indicate[d] that [petitioner] ha[s] failed to establish the existence of extraordinary or changed circumstances, since the time [petitioner] entered the United States until present." *Id.* at 31a n.5; see *ibid.* ("[W]e find that [petitioners] have not established to our satisfaction that they qualify for an exception to the 1-year deadline.").[3]

The BIA then "remanded" the case to the IJ "for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and for further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h)." Pet. App. 32a.

3. The court of appeals dismissed petitioner's petition for review. Pet. App. 1a-10a. The court first con-

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[2] Petitioner did not appeal the IJ's ruling regarding CAT protection, and that claim therefore is not before this Court.

[3] The BIA also rejected petitioner's contention that the IJ violated his due process rights in conducting his removal hearing. Pet. App. 31a-32a. The court of appeals also rejected that claim, *id.* at 10a, and petitioner does not renew it before this Court.

sidered whether the BIA had issued a "final order of removal," a prerequisite for its jurisdiction under 8 U.S.C. 1252(a)(1). Pet. App. 3a-5a. It acknowledged that the BIA "remanded to the IJ under 8 C.F.R. § 1003.1(d)(6) for a background check to ensure eligibility for withholding of removal," but it determined that the BIA's order was nonetheless "final" because "the only question within the judicial ken" on appeal "had been conclusively resolved," and "[e]verything that remained was a matter of administrative discretion." *Id.* at 3a-4a. The court next determined that there was an "order of removal," because both the IJ and the BIA found petitioners removable, even though they did not order removal. *Id.* at 4a-5a (citing 8 U.S.C. 1101(a)(47)(A)).[4]

The court of appeals then concluded that it lacked jurisdiction to consider petitioner's challenge to the BIA's conclusion that he failed to establish changed or extraordinary circumstances to justify his untimely asylum application. Pet. App. 5a-10a. The court explained that the INA specifically bars judicial review of such determinations: Although the INA "allows the agency to accept untimely [asylum] applications under certain circumstances," it also states that "'[n]o court shall have jurisdiction to review any determination of the [agency] under paragraph (2).'" *Id.* at 6a (first and third pairs of brackets in original) (quoting 8 U.S.C. 1158(a)(3)).

The court noted that the INA provides an exception to that bar to judicial review for "constitutional claims or questions of law," 8 U.S.C. 1252(a)(2)(D), but it rejected petitioner's contention that his petition raised a

[4] The court also determined that petitioners had Article III standing because "there are enough differences between asylum and withholding of removal to yield a live controversy." Pet. App. 5a-6a.

"question[] of law" within the meaning of 8 U.S.C. 1158(a)(2)(D). Pet. App. 6a-9a. The court determined that "both the Board and the IJ stated with precision the rules for exceptions to the one-year deadline." *Id.* at 6a. And, the court explained, neither of the IJ's two conclusions—"that [petitioner] had deliberately refrained from making a timely application for asylum, and that any change in conditions in Colombia since then is not material"—raised a "question[] of law," because "[t]he first is a conclusion of fact and the second is an application of law to fact." *Ibid.* The court observed that if petitioner was correct that his challenge to the agency's fact-bound conclusion about timeliness raised a "question[] of law," then "every error an agency can make is in the end one of 'law,'" and the INA's various limits on judicial review would be "erased from the statute books." *Ibid.*

In the court's view, the INA's exception for "questions of law" "is limited to 'pure' questions of law—situations in which a case comes out one way if the Constitution or statute means one thing, and the other way if it means something different." Pet. App. 7a. It rejected petitioner's contention that 8 U.S.C. 1252(a)(2)(D) "authorizes judicial review of all 'mixed questions of law and fact,' including all applications of law to fact," "[b]ecause no administrative case can be decided without applying some law to some facts." Pet. App. 8a. The court thus concluded that "Section 1252(a)(2)(D) does not restore jurisdiction when, as in this case, the governing rules of law are undisputed." *Id.* at 10a.

ARGUMENT

The court of appeals correctly held that it lacked jurisdiction to consider whether the Board of Immigration Appeals erred in concluding that petitioner failed to establish "extraordinary circumstances" or "changed circumstances" to justify the late filing of his asylum application. The question whether the courts of appeals retain jurisdiction under 8 U.S.C. 1252(a)(2)(D) to review the agency's decision that an asylum applicant failed to demonstrate "changed circumstances" or "extraordinary circumstances" to excuse the untimely filing of his application is a recurring issue that has led to some disagreement among the courts of appeals and may warrant this Court's review in an appropriate case. This is not an appropriate case, however, because the court of appeals lacked jurisdiction on the separate ground that the BIA's decision was non-final; because the court of appeals was correct in holding that it lacked jurisdiction to review petitioner's challenges to the denial of his request for asylum; and because resolution of the question regarding the scope of 8 U.S.C. 1252(a)(2)(D) likely will not change the outcome of petitioner's case. Further review is therefore unwarranted.

1. Petitioner correctly notes (Pet. 13-14) that the federal courts of appeals have disagreed about whether they have jurisdiction under 8 U.S.C. 1252(a)(2)(D) to review the BIA's determination that an alien failed to adduce sufficient facts to demonstrate "extraordinary circumstances" or "changed circumstances" to justify the untimely filing of an asylum application. In addition to the Seventh Circuit, see Pet. App. 6a-10a; *Vasile* v. *Gonzales*, 417 F.3d 766, 768-769 (2005), the Second, Third, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits have held that such a claim normally does not raise

a "question[] of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). See *Zhu* v. *Gonzales*, 493 F.3d 588, 596 n.31 (5th Cir. 2007) (extraordinary circumstances); *Chen* v. *United States Dep't of Justice*, 471 F.3d 315, 332 (2d Cir. 2006) (changed or extraordinary circumstances)[5]; *Ferry* v. *Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006) (changed or extraordinary circumstances); *Almuhtaseb* v. *Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006) (changed circumstances); *Sukwanputra* v. *Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006) (changed or extraordinary circumstances); *Ignatova* v. *Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005) (extraordinary circumstances); *Chacon- Botero* v. *United States Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (changed or extraordinary circumstances).[6] Those courts have explained that a challenge to the BIA's determination that an alien did not establish "changed circumstances" or "extraordinary circumstances" "is merely an objection to the IJ's factual findings and the balancing of factors in which discretion was exercised," not an argument that raises a "question[] of

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[5] Petitioner suggests (Pet. 15) that the Second Circuit has agreed with the Ninth Circuit, but that is incorrect. The Second Circuit noted in *Chen* that a claim (like petitioner's) that is "essentially a quarrel about [the IJ's] fact-finding" with respect to the one-year asylum deadline does not raise a "question[] of law," 471 F.3d at 330, and the Second Circuit expressly took issue with the Ninth Circuit's approach in *Liu* v. *INS*, 508 F.3d 716, 721 n.3 (2d Cir. 2007). See also Pet. App. 7a-8a.

[6] The First and Fourth Circuits have stated that a challenge to the BIA's conclusion that an asylum application was untimely generally is a fact-specific question that does not raise a "question[] of law." Those statements appear to be dicta, however, because neither case expressly considered a "changed circumstances" or "extraordinary circumstances" determination. See *Niang* v. *Gonzales*, 492 F.3d 505, 510 n.5 (4th Cir. 2007); *Mehilli* v. *Gonzales*, 433 F.3d 86, 93 (1st Cir. 2005).

law" under 8 U.S.C. 1252(a)(2)(D). *Chen*, 471 F.3d at 332.

The Ninth Circuit, in contrast, has held that an alien's fact-specific challenge to the BIA's determination that he has not established "changed circumstances" or "extraordinary circumstances" does raise a "question[] of law" under 8 U.S.C. 1252(a)(2)(D). See *Ramadan* v. *Gonzales*, 479 F.3d 646, 649-656 (9th Cir. 2007) (changed circumstances). In the Ninth Circuit's view, the term "questions of law" in 8 U.S.C. 1252(a)(2)(D) "extends to questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law." *Ramadan*, 479 F.3d at 650.[7]

2. That disagreement in the courts of appeals may warrant this Court's attention in an appropriate case. This is not an appropriate case, however, for three reasons.

a. First, this Court lacks jurisdiction to consider petitioner's claim because the court of appeals lacked jurisdiction to review the BIA's decision for the separate reason that it was non-final. Petitioner has invoked (Pet. 1) this Court's jurisdiction under 28 U.S.C. 1254, which authorizes the Court to review "[c]ases in" the courts of appeals. Under Section 1254, this Court has jurisdiction to review the merits of a case only if the court of appeals properly had jurisdiction to do so. See

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[7] Petitioner cites various cases (Pet. 17-26) addressing whether *other* types of claims (*i.e.*, claims other than challenges to "changed circumstances" or "extraordinary circumstances" determinations) raise "questions of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). Those cases, however, do not shed light on whether petitioner's claim raises a "question[] of law," because that inquiry depends on the type of claim at issue. See, *e.g.*, *Almuhtaseb*, 453 F.3d at 748 n.3.

Nixon v. *Fitzgerald*, 457 U.S. 731, 742-743 & n.23 (1982); *United States* v. *Nixon*, 418 U.S. 683, 690 (1974). In this case, the court of appeals lacked jurisdiction over petitioner's petition for review, and this Court thus lacks jurisdiction over the petition for review as well.

The court of appeals' jurisdiction was invoked under 8 U.S.C. 1252, which authorizes the courts of appeals to review "final order[s] of removal" by petition for review so long as the petition for review is filed within 30 days of the final order of removal. 8 U.S.C. 1252(a)(1), (b)(1). Under 8 U.S.C. 1101(a)(47)(B), an order of removal becomes final "upon the earlier of—(i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period" for appealing to the Board. As "jurisdictional statute[s]," those provisions "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 212 (1968).

The BIA's decision was not a "final order of removal" because the BIA remanded the case for the completion of "identity, law enforcement, or security investigations or examinations, and further proceedings" to establish petitioner's eligibility for withholding of removal. Pet. App. 32a. In 2005, the Attorney General determined that, in light of national security concerns, an alien should not be granted relief from removal until the Department of Homeland Security completes an investigation of the alien's background, which includes criminal and intelligence indices checks. See *Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals*, 70 Fed. Reg. 4743-4744 (2005); see 8 C.F.R. 1003.1(d) (codifying this rule). The Attorney General explained

that the background investigation must be completed "*prior to the granting* of * * * withholding of removal." 70 Fed. Reg. at 4746 (emphasis added). Moreover, he stated that, "[i]n any case that is remanded to the immigration judge pursuant to § 1003.1(d)(6), the Board's order will be an order remanding the case and *not a final decision*, in order to allow DHS to complete or update the identity, law enforcement, and security investigations" and to allow the IJ to "consider the results of the completed or updated investigations or investigations before issuing a decision granting or denying the relief sought." *Id.* at 4748 (emphasis added). Accordingly, in the event of a remand to the IJ, an order of removal becomes a final order under 8 U.S.C. 1101(a)(47)(B), and is subject to judicial review under 8 U.S.C. 1252, only following the conclusion of the proceedings after the remand. The Attorney General's regulation, combined with 8 U.S.C. 1101(a)(47)(B), thus makes clear that a decision of the BIA is not "final" for purposes of judicial review when it has remanded the case to the IJ for the completion of background check investigation as a prerequisite to the granting of relief.

The Third Circuit came to the same conclusion in *Vakker* v. *Attorney General*, 519 F.3d 143 (2008), petition for cert. pending, No. 08-5 (filed June 12, 2008), where it determined in analogous circumstances that an order of the BIA that remanded the case to the IJ was not a final order of removal. The court of appeals explained: "Ordinarily, when the BIA remands removal proceedings to the IJ pursuant to 8 C.F.R. §[] 1003.47(h)"—a regulatory companion to 8 C.F.R. 1003.1(d)(6)—"the 'final order' in the removal proceedings is the IJ's order following remand." 519 F.3d at 147 (citing *In re Alcantara-Perez*, 23 I. & N. Dec. 882 (B.I.A.

2006)). And the court noted that "[t]he regulations themselves are fairly clear in this regard," pointing to the statement in 8 C.F.R. 1003.1(d)(6) that the BIA "*shall not issue a decision affirming or granting*" relief prior to the completion of a background investigation. 519 F.3d at 147 n.3.[8]

The court of appeals erred in holding that the BIA's order was a "final order of removal." The court correctly determined that the BIA had entered an "order of removal" because it adopted the IJ's finding that petitioners were removable. Pet. App. 4a-5a. But it erred in concluding that the order was "final" in light of the BIA's remand of the case to the IJ for additional proceedings. Instead of turning to 8 U.S.C. 1101(a)(47) and 8 C.F.R. 1003.1(d) to assess the finality of the BIA's order, the court of appeals looked to *Forney* v. *Apfel*, 524 U.S. 266 (1998), and stated that an order is final when "the original decision on the only question open to judicial review is 'final.'" Pet. App. 3a-4a. But *Forney* involved a statute addressing the finality of a *district court* decision for purposes of appellate review under 28 U.S.C. 1291, not the finality of an *agency* decision, and the *Forney* Court recognized that an agency decision remanding a case would provide "less closely analogous circumstances" and may not be judicially reviewable. See 524 U.S. at 269, 271-272.

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[8] In *Yusupov* v. *Attorney General*, 518 F.3d 185 (3d Cir. 2008), the Third Circuit held that a BIA decision that remanded to the IJ for a background check under 8 C.F.R. 1003.1(d)(6) did constitute a "final order of removal," but it explained that, unlike in *Vakker*, the aliens in *Yusupov* had been *denied* withholding of removal, so that "[n]othing in their background checks could affect" their eligibility for relief. 518 F.3d at 196 n.19.

An agency's decision is final when it "mark[s] the consummation of the agency's decisionmaking process" and is "one by which rights or obligations have been determined or from which legal consequences will flow." *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997) (internal quotation marks omitted). The BIA's decision here did not mark the end of the agency's process, and petitioner's rights were not conclusively determined. As the BIA has made clear, every proceeding before the IJ on remand could have some effect on the alien's eligibility for relief from removal, because the IJ re-acquires jurisdiction over the entire case, is required to consider the relevance of any new evidence, and may entertain a motion to reopen for consideration of a new form of relief. See *In re M-D-*, 24 I. & N. Dec. 138, 141-142 (B.I.A. 2007). If the IJ denies withholding relief on remand, the alien can then appeal that ruling to the BIA (and renew any other challenges previously rejected by the BIA), and then seek judicial review in a single petition for review of all issues finally resolved against him by the BIA. That approach promotes the interests of both administrative and judicial efficiency, and therefore reinforces the conclusion that the BIA's remand decision was not a "final" order. The court of appeals thus should have determined that the BIA's order was non-final.

Because the court of appeals lacked jurisdiction over petitioner's claim, this Court does as well. At the very least, the presence of this substantial jurisdictional question makes this case a poor vehicle to consider the question petitioners present regarding the scope of 8 U.S.C. 1252(a)(2)(D).

b. Second, even if the BIA's order was a "final order of removal," the court of appeals correctly determined

that it lacked jurisdiction over petitioner's fact-bound claim because it does not raise a "question[] of law."

Under 8 U.S.C. 1158(a)(3), "[n]o court shall have jurisdiction to review any determination" regarding an exception to the one-year filing deadline for asylum claims, including the determination that a particular asylum applicant did not "demonstrate[] to the satisfaction of the Attorney General * * * the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing," 8 U.S.C. 1158(a)(2)(D). As petitioner acknowledges (Pet. 3-4, 9-10), his petition for review challenged a determination that his asylum application was untimely and that he failed to demonstrate changed circumstances or extraordinary circumstances to justify that untimely filing. Judicial review of petitioner's claim is therefore barred under 8 U.S.C. 1158(a)(3) unless the exception for "questions of law" in 8 U.S.C. 1252(a)(2)(D) applies.

The court of appeals correctly held that petitioner's challenge to the BIA's fact-bound, discretionary determination does not raise a "question[] of law." As the court of appeals explained, "Section 1252(a)(2)(D) does not restore jurisdiction when, as in this case, the governing rules of law are undisputed." Pet. App. 10a. The court noted that "both the Board and the IJ stated with precision the rules for exceptions to the one-year deadline." *Id.* at 6a. And it explained that the agency made two findings—"that [petitioner] had deliberately refrained from making a timely application for asylum, and that any change in conditions in Colombia since then is not material"—neither of which "rests on or reflects a legal mistake," because "[t]he first is a conclusion of

fact and the second is an application of law to fact." *Ibid.*

The court of appeals correctly rejected the view that any "applications of law to fact" raise a "question[] of law," reasoning that "no administrative case can be decided without applying some law to some facts." Pet. App. 8a. If petitioner's fact-bound challenge to the Attorney General's discretionary determination raised a "question[] of law," the court explained, then "every error an agency can make is in the end one of 'law,'" and that would "erase[]" 8 U.S.C. 1158(a)(3) and other jurisdictional limitations "from the statute books." Pet. App. 6a-7a; see *id.* at 8a (noting that petitioner's reading of Section 1252(a)(2)(D) would "vitiate[] all clauses in the statute, including § 1158(a)(3), that limit judicial review of particular classes of decisions"); see also, *e.g.*, *Higuit* v. *Gonzales*, 433 F.3d 417, 420 (4th Cir.) (courts "are not free to convert every immigration case into a question of law, and thereby undermine Congress's decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive"), cert. denied, 548 U.S. 906 (2006). Instead, the court explained, a claim raises a "question[] of law" when "a case comes out one way if the Constitution or statute means one thing, and the other way if it means something different." Pet. App. 7a.

Moreover, regardless of whether an "application of law to fact" can raise a "question[] of law," petitioner did not raise a "question[] of law" because the question whether he demonstrated "changed circumstances" or "extraordinary circumstances" to justify an untimely filing is a question committed to the Attorney General's discretion. Such a discretionary determination does not raise a "question[] of law" within the meaning of 8

U.S.C. 1252(a)(2)(D). The text of the INA entrusts the "extraordinary circumstances" or "changed cir-cumstances" determination to the discretion of the Attorney General: it says that the Attorney General "may" consider an untimely asylum application if the alien demonstrates changed or extraordinary circumstances "to the satisfaction of the Attorney General." 8 U.S.C. 1158(a)(2)(D). Congress's use of the word "may" "expressly recognizes substantial discretion." *Haig* v. *Agee*, 453 U.S. 280, 294 n.26 (1981). And the phrase "to the satisfaction of the Attorney General" demonstrates Congress's expectation that the Attorney General's assessment "entails an exercise of discretion." *Sukwanputra*, 434 F.3d at 635.[9]

A challenge to a discretionary determination by the Attorney General does not raise a "question[] of law" under 8 U.S.C. 1252(a)(2)(D). That is precisely the type of claim over which Congress intended to withhold juris-

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[9] Contrary to petitioner's suggestion (Pet. 29 n.14), the issuance of regulations interpreting 8 U.S.C. 1158(a)(2)(D) does not make a determination as to whether an asylum applicant demonstrated "changed circumstances" or "extraordinary circumstances" non-discretionary. See, *e.g.*, 8 C.F.R. 1208.4(a)(2)(i)(B) (alien has burden of proving "to the satisfaction of the asylum officer, the immigration judge, or the Board that he or she qualifies for an exception to the 1-year deadline"). Nor does the INS's internal training manual for asylum officers, which in any event is not binding on the BIA or this Court. See, *e.g.*, *In re Tijam*, 22 I. & N. Dec. 408, 416 (B.I.A. 1998). Those materials are intended to guide agency adjudicators in making discretionary determinations that are unreviewable under 8 U.S.C. 1158(a)(3) to avoid wide disparities in their application; it would be improper to interpret them as having the quite different effect of enabling judicial challenges to such decisions notwithstanding the express statutory limitation on such review. Cf. *Sandin* v. *Conner*, 514 U.S. 472, 482-83 (1995) (prison administrative regulations should not be construed as creating judicially enforceable liberty interests under the Due Process Clause).

diction under 8 U.S.C. 1252(a)(2)(D). Congress added *the exception for "constitutional claims or questions of* law" in response to concerns this Court raised about reviewability of removal orders in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), and the *St. Cyr* Court clearly differentiated between questions of law and discretionary decisions. *Id.* at 298 (noting that Court was not addressing a claim of "any right to have an unfavorable exercise of the Attorney General's discretion reviewed in a judicial forum"); *id.* at 314 n.38 ("[T]his case raises only a pure question of law as to respondent's statutory eligibility for discretionary relief, not * * * an objection to the manner in which discretion was exercised."). The legislative history of the REAL ID Act confirms that Congress did not intend to permit review of such determinations. See, *e.g.*, H.R. Rep. No. 72, 109th Cong., 1st Sess. 175 (2005) (Section 1252(a)(2)(D) was intended "to permit judicial review over those issues that were historically reviewable on habeas," namely "constitutional and statutory-construction questions, *not discretionary or factual questions*" (emphasis added)). Indeed, reading "questions of law" to encompass determinations such as those at issue here would have the opposite effect of what Congress intended in committing certain determinations to the discretion of the Attorney General. See, *e.g.*, *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) ("protecting the Executive's discretion from the courts" could "fairly be said to be the theme of the legislation" in which Congress added not only 8 U.S.C. 1252(a)(2)(A)-(C) but also 8 U.S.C. 1158(a)(3)). Because petitioner's claim is a fact-bound challenge to a determination that is in any event discretionary, it does not raise a "question[] of law" under 8 U.S.C. 1252(a)(2)(D), and the court of appeals therefore

correctly determined that it lacked jurisdiction to consider it.[10]

c. Third, even if there were jurisdiction, petitioner could not show that the agency erred in refusing to consider his untimely asylum application. First, petitioner has not demonstrated any legal error in the BIA's conclusion. As the court of appeals correctly determined, the BIA applied the correct legal standard in determining whether petitioner met his burden of justifying his untimely filing: "[B]oth the Board and the IJ stated with precision the rules for exceptions to the one-year deadline." Pet. App. 6a. Indeed, the court of appeals noted, "the governing rules of law are undisputed" in this case. *Id.* at 10a.

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[10] Although petitioner included, as one of his questions presented (Pet. i), "[w]hether the Constitution guarantees review in some court by some means over petitioner's claims regarding the asylum filing exceptions," he failed to present any argument in support of the claim that the Constitution requires a judicial forum to consider his challenge to the BIA's timeliness determination. That contention is therefore waived. Moreover, that claim was not pressed or passed on below, and thus it should not be considered by this Court. *E.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992)

To the extent that petitioner suggests that the phrase "question[] of law" should be interpreted to permit judicial review of his fact-bound challenge so as to "avoid any need to consider constitutional objections to § 1252(a)(2)(D)," the court of appeals correctly rejected that argument. Pet. App. 8a-9a. As the court of appeals explained, "the Constitution itself allows Congress to create exceptions to the jurisdiction of the federal courts," and "[p]rovisions foreclosing judicial review of particular administrative decisions are common." *Id.* at 8a. Moreover, as explained above, the court of appeals' determination that it lacked jurisdiction here is fully consistent with this Court's conclusions in *St. Cyr*, because this Court made clear that its constitutional concerns did not extend to the agency's discretionary determinations. See pp. 19-20, *supra*.

Further, petitioner has not shown that the BIA's determination that he failed to adduce facts sufficient to show changed or extraordinary circumstances was unsupported by substantial evidence. As the IJ explained, petitioner did not demonstrate, as a factual matter, that circumstances "changed" in Colombia in any meaningful way that would justify a late filing. Pet. App. 18a-19a. And the IJ found that there was "*no correlation* between [petitioner's] decision to file" his application and his alleged "changed circumstances." *Id.* at 18a (emphasis added). Moreover, the IJ found that petitioner was not operating under any legal disability that would constitute "extraordinary circumstances"; instead, "[t]he IJ found that [petitioner] had deliberately refrained from making a timely application for asylum." *Id.* at 6a. The BIA adopted the IJ's decision, including those factual findings. *Id.* at 29a. If the court of appeals were to consider the timeliness question—and if it could review the BIA's factual determinations at all—it would do so under the "substantial evidence" standard, *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992), and the agency's factual determinations would be "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B). On this record, petitioner could not show that the BIA's fact-specific conclusions were not supported by substantial evidence.

Moreover, an untimely asylum application must be filed within a reasonable period of time in light of the circumstances justifying the late filing, 8 C.F.R. 1208.4(a)(4)(ii) and (5), which petitioner's likely was not. And even if petitioner could establish that his three-year filing delay was "reasonable," that would only mean that the untimely application "*may* be considered." 8 U.S.C. 1158(a)(2)(B) and (D) (emphasis added). Thus, there is

little prospect that resolution of the question regarding the scope of 8 U.S.C. 1252(a)(2)(D) would affect the outcome of this case in any event. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2008

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(2)

No. 07-1363

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ARMANDO JIMÉNEZ VIRACACHA, IRMA YOLANDA JIMÉNEZ, ELIANA MARITZA JIMÉNEZ, ANDRES FELIPE JIMÉNEZ, MARIA PAULA JIMÉNEZ,

Petitioners,

—v.—

MICHAEL B. MUKASEY,
UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The government does not argue that the questions presented in the Petition are unworthy of this Court's attention, and indeed, concedes that the Petition presents a "recurring" jurisdictional issue on which there is "disagreement" in the courts of appeals. Brief in Opposition ("BIO") 10. The government contends, however, that this case presents a poor vehicle for resolving the questions. That is incorrect.

I. THE JURISDICTIONAL ISSUE PRESENTED IN THE PETITION INVOLVES A MATURE AND DEEP SPLIT.

In light of the government's concession that the jurisdictional issue raised in the Petition involves a recurring issue on which the courts of appeals are divided, petitioner makes only the following brief points regarding the pressing need for review.

First, the Second Circuit in *Liu v. INS*, 508 F.3d 716 (2d Cir. 2007), did not take "issue with the Ninth Circuit's approach." BIO 11 n.5. *Liu* merely states that pure "factual determinations" are unreviewable, a proposition with which the Ninth Circuit agrees. 508 F.3d at 721 n.3. *See* Pet. 14-16 and n.8.[1]

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1 In addition, *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 324-30 (2d Cir. 2006), did not categorically hold that all claims related to the asylum filing exceptions were unreviewable (BIO 11 n.5), but only that courts must examine each claim

Second, the government is incorrect that the significance of the jurisdictional issue in this case is limited to the asylum filing context. BIO 12 n.7. Section 1252(a)(2)(D) is a *generally-applicable* jurisdictional provision. Thus, the disagreement in the courts of appeals over the statute's proper interpretation has broad significance in the immigration area that goes well beyond asylum. *See* Pet. 23-26. Indeed, in this case, the Seventh Circuit held broadly that the term "questions of law" in Section 1252(a)(2)(D) is limited to "pure" legal claims, and expressly relied on a prior Seventh Circuit decision involving an alien's statutory eligibility for a humanitarian waiver. App. 6a-8a (citing *Cevilla v. Gonzales*, 446 F.3d 658 (7th Cir. 2006)).

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS THE SCOPE OF SECTION 1252(a)(2)(D).

The threshold question dividing the courts of appeals is whether Section 1252(a)(2)(D) is limited to "pure" questions of law. The Seventh Circuit's decision squarely addressed that issue. The Seventh Circuit also squarely addressed the constitutionality of limiting review to pure questions of law. This case, therefore, presents a particularly good vehicle for resolving the conflict in the courts of appeals over the meaning of "questions of law" in Section 1252(a)(2)(D).

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individually to determine whether it raises a question of law. Pet. 15.

The government contends, however, that the Court should deny review because (1) the Seventh Circuit's jurisdictional ruling was correct, (2) petitioner would in any event have lost on the merits, and (3) the Seventh Circuit "lacked jurisdiction on the separate ground that the BIA's decision was non-final." BIO 10. Each of these contentions is unpersuasive.

A. The Seventh Circuit Erred In Dismissing Petitioner's Claims.

The government's contention (at 16-21) that the Seventh Circuit's ruling was correct is not a reason to deny review in a case involving an entrenched circuit split. In any event, as discussed in the Petition, the Seventh Circuit's ruling was not correct. Four points are particularly significant.

1. The government's contention that Section 1252(a)(2)(D) encompasses only "pure" questions of law fails to rebut the two most critical points about the statute. Pet. 26-28. First, the government does not dispute that Section 1252(a)(2)(D) was intended to preserve the scope of review previously available in habeas. Equally as significant, the government does not contend that habeas review has traditionally been limited to an artificial set of "pure" legal claims. In light of the government's failure to take issue with either of these two points, it cannot maintain that the Seventh Circuit was correct in limiting Section 1252(a)(2)(D) to "pure" legal claims.

2. The government's constitutional analysis is similarly flawed.[2] Like the Seventh Circuit, the government fails to address the Suspension Clause, the history of immigration habeas review or this Court's observation in *INS v. St. Cyr*, 533 U.S. 289, 302 (2001), that habeas jurisdiction in the executive detention context has always included review of the "application" of statutes. Nor does the government address *Boumediene v. Bush*, 128 S.Ct. 2229, 2266 (2008), where the Court emphatically reaffirmed *St. Cyr*, stating that it viewed as "uncontroversial . . . that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous *application* or interpretation' of relevant law" (emphasis added) (quoting *St. Cyr*).

3. The government contends (at 19) that petitioner's claims involve unreviewable *discretionary* determinations, noting that the statute says only that the Attorney General "may" excuse a late-filed application if the alien demonstrates changed or extraordinary circumstances. But

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[2] Contrary to the government's argument (at 21 n.10), petitioner did not waive the constitutional question. The court of appeals decided the issue, petitioner made it a question presented, and petitioner also expressly stated in the Petition that the court of appeals was wrong as a matter of statutory construction and "constitutional mandate." Pet. 26. In this case, moreover, the statutory and constitutional analyses overlap because Congress intended for the statute to preserve all review required by the Suspension Clause. *Cf. INS v. St. Cyr*, 533 U.S. 289 (2001).

petitioner does not challenge any ultimate discretionary authority the Attorney General may possess, but rather, whether he satisfied the threshold statutory eligibility criteria (*i.e.*, the changed or extraordinary circumstances criteria).

The fact that a statute may vest the ultimate decision in the discretion of the Attorney General does not mean that the threshold statutory eligibility criteria are likewise discretionary and unreviewable. *St. Cyr*, 533 at 307-08 (noting in the waiver context the distinction between statutory eligibility criteria and the ultimate discretionary determination). And as explained in the Petition, the changed or extraordinary circumstances statutory eligibility criteria are not discretionary. Pet. 29-30.

4. Finally, the government argues that petitioner's claim is too "fact-bound" to raise a question of law. BIO 17. But a claim involving the application of law to fact will always be tied to the particular facts of a case; if it were not, then it would be more akin to a pure question of law.

As this Court has explained, there is an analytical difference between a pure factual claim and one involving the application of law to fact. A pure fact involves an inquiry into questions that can be determined without reference to the legal standards at issue. *See Thompson v. Keohane*, 516 U.S. 99, 111-12 (1995) (stating that the underlying primary facts involve the "what happened" of a particular issue); *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963) (stating that "[b]y 'issues of fact' we

mean to refer to what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators'") (internal citations omitted), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

In contrast, the Court has stated that a claim involving the application of law to fact is one where "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). As the Court has further stressed, it is only by reviewing the application of law to concrete factual settings that legal rules can ordinarily take shape. *See Thompson*, 516 U.S. at 115 (emphasizing "the law declaration aspect" of reviewing the application of law to fact); *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (explaining that "the legal rules for probable cause and reasonable suspicion acquire content only through application" and that "[i]ndependent review is . . . necessary if appellate courts are to maintain control of, and to clarify, the legal principles").

In short, a claim involving the application of law to fact will always be "fact-bound," but that does not mean it involves a challenge to the underlying descriptive facts. Insofar as the courts of appeals are generally struggling in the immigration context to differentiate between descriptive facts, on the one hand, and the application of the governing legal

standards to those facts, on the other, that is all the more reason for this Court to grant review.

B. Petitioner Will Prevail On The Merits.

This Court routinely reviews jurisdictional issues without taking a position on the merits, especially where, as here, the court of appeals did not reach the merits. In any event, petitioner's claim is meritorious.

There is no question that petitioner satisfies the standard for asylum, since he already was awarded withholding, which requires aliens to satisfy a higher burden. Pet. 8. Petitioner will likewise be able to demonstrate changed or extraordinary circumstances excusing the late filing.

Petitioner delayed filing because there was an ongoing peace process in Colombia and he did not want to prematurely file his application. When the peace process stalled, he promptly filed his asylum application. The IJ acknowledged that the civil war in Colombia had "intensified" and that there was a change in the Colombian administration, but concluded that the situation was essentially the same because it was still the "guerrillas" fighting against the "government." App. 19a. But that incorrectly assumes that a "material" change (as that term is used in the statute) requires a qualitative change in the situation, such as a change in the parties or structure of the conflict.

As the Ninth Circuit recently explained, Congress was not seeking to encourage aliens to file

within one year even if their asylum claims had not yet matured. *Fakhry v. Mukasey*, 524 F.3d 1057 (9th Cir. 2008). Thus, in *Fakhry*, the Ninth Circuit remanded to the BIA, noting that the alien had understandably waited to file until the peace process in Senegal had failed. The Court stressed that the "resumption of fighting . . . could constitute changed circumstances," explaining that "a likely purpose of the [asylum] exception [is] to excuse late applications when an alien previously had a weak or nonexistent case for asylum." *Id.* at 1063-64.

As in *Fakhry*, petitioner has a strong merits claim. More pertinently, petitioner's merits claim illustrates precisely why there must be jurisdiction. In the absence of judicial review, the BIA will have the final and unreviewable word on fleshing out the meaning of numerous statutory provisions, including the provisions governing asylum filings.[3]

C. The Finality Issue Decided By The Court Of Appeals Is Not A Basis On Which To Deny Review.

The Seventh Circuit's finality ruling does not raise a substantial question on the facts of this case. In any event, if the Court were to conclude that the

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[3] The government suggests that petitioner would not prevail under the "substantial evidence" test. BIO 22. That is incorrect. In any event, the government does not explain why the Court would employ that test if it ultimately concluded that petitioner has raised a question of *law*.

finality issue is substantial, then the Court should grant review on that issue as well.[4]

1. The Seventh Circuit's finality ruling was correct. That is true as a general matter and on the particular facts of this case.

a. Under 8 U.S.C. 1101(a)(47)(A), an "order of deportation" is a determination "concluding that the alien is *deportable* or ordering deportation" (emphasis added). Thus, as the government recognizes (BIO 15), the "court of appeals correctly determined that the BIA had entered an 'order of removal' because it adopted the IJ's finding that petitioners were removable" (*i.e.*, that petitioners remained in the United States beyond the authorized time). Section 1101(a)(47)(B), in turn, provides that an order of deportation becomes "final" upon a determination by the BIA "affirming" the order of

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[4] The government appears to suggest that if the Court grants the Petition, it *must* also grant review on the finality issue because it would otherwise lack jurisdiction to decide the questions in the Petition. BIO at 12-16. There is nothing, however, preventing the Court from taking only certain questions, even where the remaining issues are jurisdictional and were fully decided by the court of appeals. *See, e.g., Tenet v. Doe*, 544 U.S. 1, 6 n.4 (noting that questions presented did not include jurisdictional issue decided by the court of appeals and district court). The two cases cited by the government (at 13) – *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 & n.23 (1982), and *United States v. Nixon*, 418 U.S. 683, 690 (1974) – are inapposite because both involved whether the Court could reach the *merits* without first determining jurisdiction. Here, petitioner is not raising a merits issue in this Court.

deportation (or when the time for appealing to the BIA elapses).

Thus, under the statute's plain terms, the order became "final" – and reviewable – once the BIA affirmed the IJ's determination that petitioner was removable. *See, e.g., Lolong v. Gonzales*, 484 F.3d 1173, 1178 (9th Cir. 2007) (en banc) (collecting cases). Accordingly, the Seventh Circuit correctly ruled that it had jurisdiction to review the order.

Moreover, even assuming that the statute would have allowed the court of appeals, for prudential reasons, to *decline* to exercise jurisdiction over the final order, the Seventh Circuit properly recognized that such concerns did not weigh in favor of delaying review for a routine background check. As the courts of appeals have recognized, delaying review to await the outcome of *ancillary* matters makes little sense. *See, e.g., Saldarriaga v. Gonzales*, 402 F.3d 461, 465 n.2 (4th Cir. 2005) (agreeing with "sister circuits" that a BIA order remanding the case for "subsidiary determinations" is "immediately appealable"). In any event, the court of appeals' decision to engage in review does not raise a *jurisdictional* problem under the statute.

Notwithstanding the statute, the government stresses that, under the regulations, the BIA cannot affirm or grant withholding in the absence of a background check. BIO 14 (discussing 8 C.F.R. 1003.1(d)(6)). But those regulations nowhere provide that an alien cannot appeal the BIA's adverse rulings to the court of appeals, but only that a grant of

withholding will not be affirmed until the background checks are completed.[5]

b. In any event, on the particular facts of this case, the government's position is insubstantial. First, the government does not dispute that the background check conducted after the remand was successfully completed approximately six months before the Seventh Circuit ultimately ruled in this case. Pet. 10 n.5. At bottom, then, the government is arguing that petitioner should have gone through the formality of filing yet another appeal to the BIA on the asylum issue, after which he could then have filed in the court of appeals. That elevates form over substance.

The government also ignores that, in this case, the IJ had already received the (successful) results of the background checks prior to granting withholding in the first instance. *See* Addendum A (excerpts from administrative record). The checks performed after

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[5] The government cites *Vakker v. Attorney General*, 519 F.3d 143 (3d Cir. 2008), petition for cert. pending, No. 08-5 (filed June 12, 2008) (BIO waived). Yet, in direct contrast to its position here, the government argued in *Vakker* that the alien *could* and should immediately seek judicial review of that part of the BIA decision decided adversely to him, even though the BIA remanded for background checks on withholding. Moreover, the statements in *Vakker* were dicta because the alien there *received* review.

the remand were thus the *second* background checks in the case.[6]

Petitioner was not required to delay seeking judicial review on his asylum claim until the completion of these updated background checks. Indeed, if aliens could be prevented from seeking review whenever the BIA remanded for additional background checks, they could be prevented from ever reaching the court of appeals.[7]

In short, although the Seventh Circuit did not hinge its decision on these facts, this Court can decide the issue as narrowly as it chooses. For present purposes, the critical point is that there is virtually no likelihood that on the facts of this case the removal order was not final.

2. Alternatively, the Court can re-write the questions in the Petition and add the government's Question 1 regarding finality. Indeed, the logic of

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[6] Unlike this case, there is no suggestion in the Third Circuit's *Vakker* decision that the alien in that case had already successfully completed the background checks at the initial immigration judge hearing.

[7] Under 8 C.F.R. 1003.1(d)(6)(i)(B), the BIA may remand to the IJ for updated checks and routinely does so because background checks require regular updating. But if the mere updating of background checks could foreclose judicial review, the alien could find himself in an endless loop: each time the alien appealed to the BIA, his case would be remanded for routine updating, and he might never be able to seek judicial review. Not surprisingly, therefore, the regulations nowhere provide that judicial review is foreclosed in cases where there is simply a remand for updated background checks.

the government's position does not support denying the Petition altogether. Rather, given the government's view that the finality question is "substantial" (BIO 16), and its acknowledgment that there is a split on the scope of Section 1252(a)(2)(D) (BIO 10), the government should presumably welcome this Court's resolution of both sets of questions. That is particularly so given that the government continues to press its finality arguments in the courts of appeals.

Moreover, if the Court grants review, it may decide the issues in any order it chooses. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (deciding personal jurisdiction before subject matter jurisdiction, emphasizing that the Court has flexibility in the "sequencing of jurisdictional issues").

CONCLUSION

The Court should grant review limited to the questions presented in the Petition, or alternatively, on the questions in the Petition and Respondent's Question 1.

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August 2008

ADDENDUM

ADDENDUM

U.S. Department of Justice

Executive Office for Immigration Review

Immigration Court

Matter of File A 96 134 970

ARMANDO JIMENEZ-VIRACACHA,	)	IN REMOVAL PROCEEDINGS
	)	
Respondent	)	Transcript of Hearing

Before CRAIG M. ZERBE, Immigration Judge

Date: August 31, 2005 Place: Chicago, Illinois

Transcribed by DEPOSITION SERVICES, INC. at Rockville, Maryland

Official Interpreter:

[Administrative Record] 000594

Language: Spanish

Appearances:

For the Department of Homeland Security:

Joseph M. Yeung, Esquire

For the Respondent:

Steven Brown, Esquire

[Administrative Record] 000594

20 JUDGE TO MR. YEUNG

21 Q. And there, has there been a security clearance in

22 the case and, if so, what is the result?

23 A. All the background checks have been done and they

24 are negative. There is no impediment.

25 Q. Okay. So, in other words, they've cleared.

A 96 134 970/971/972/973/974 124 August 31, 2005

. . .

1 A. They have cleared.

* * *

[Administrative Record] 000618-19